Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.

Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH, ~~EDUCATION, AND WELFARE,~~ and Human Services, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinion below.	1
Jurisdiction	1
Questions Presented.	1
Statutues and Regulations Involved	3
Statement.	3
Reasons for Granting the Writ.	15
Summary of Reasons	15
Reasons.	19
Conclusion	30

Appendicies

Appendix A, Volume I - Opinion of Court of Appeals	1a
Appendix B, Volume II-Opinion of District Court	34a
Appendix C, Volume III-Excerpts from Statutes and Regulations	114a

Cases and Authorities

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).	17, 24
Barlow v. Collins, 397 U.S. 159 (1970).	17, 24
D.C. Federation of Civil Associations v. Volpe, 459 F2d 1231 (D.C. Cir., 1973).	21, 22

Page

Dunlop v. Bachowski,
421 U.S. 560 (1975). 17, 24

Johnson v. Robinson,
415 U.S. 360 (1974). 16, 19

Lakeside Mercy Hospital v. Indiana
State Board of Health,
421 F.Supp. 193 (N.D. Ind., 1976),
aff'd 547 F2d 1170 (7th Cir.,
1976). 18, 29

Morris v. Gressette,
432 U.S. 491 (1971). 16, 23

NAACP et al. v. WMC et al.,
No. 76-298 D.Del. 7

NAACP et al. v. WMC et al.,
426 F.Supp. 919 (1977) 8

NAACP et al. vs. WMC et al.,
436 F.Supp. 1194 (1977),
aff'd 584 F2d 619 (1978) 11, 27

NAACP et al. vs. WMC et al.,
453 F.Supp. 280 (1978),
rev'd 599 F.2d 1247 (1979) 11

NAACP et al. vs. WMC et al.,
453 F.Supp. 303 (1978) 11

Sarah A. Todd Memorial Home v.
Commonwealth of Pa., Dept. of
Health, — Pa. Cmwlth. —,
410 A2d 404 (1980). 29

Texas Medical Association v.
Mathews, 408 F.Supp. 303,
(W.D. Tex., 1976). 22

Page

Townsend v. Swank,
404 U.S. 282 (1971) 29

Weinberger v. Salfi,
422 U.S. 749 (1975) 16, 20

Statutes and Regulations

42 U.S.C. 1320a-1 . . . . . passim

29 U.S.C. §794. 7

42 U.S.C. §701. 4

42 U.S.C. §1395 4

42 U.S.C. §1396 4

42 U.S.C. §2000d. 7

42 U.S.C. §4332(c). 7

42 C.F.R. Part 100 . . . . . passim

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Wilmington United Neighborhoods (hereinafter "WUN") and individual persons, plaintiffs below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on February 6, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, Volume I, pp 1a-33a) is not yet officially reported. The opinion of the District Court (Appendix B, Volume II, pp 34a-113a) is reported at 458 F.Supp. 628.

JURISDICTION

The judgment of a divided Court of Appeals for the Third Circuit was entered on February 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented in this petition are:

(1) Whether a statutory provision precluding judicial review of determinations by a federal official precludes review of allegations of corruption against that official.

(2) Whether there is judicial review of the actions of state agencies in interpreting and applying the standards and criteria set forth in a federal statute and its implementing regulations, where the federal statute does not expressly preclude such review.

STATUTES AND REGULATIONS INVOLVED

The statute and regulations involved in this case are section 1122 of the Social Security Act (42 U.S.C. § 1320a-1 et seq.) and its implementing regulation (42 C.F.R. §§ 100.101 - 100.109). The pertinent portions of the statute and regulation appear at Appendix C, Volume III, pp 114a - 132a).

STATEMENT

Under §1122 of the Social Security Act, a State may enter into an agreement with the U.S. Department of Health, Education, and Welfare (hereinafter "HEW") whereby proposed capital expenditures of health care facilities will be reviewed

for their consistency with standards, criteria, and plans developed pursuant to various federal health authorities and the §1122 implementing regulations (42 C.F.R. §100.107; App.127a). In a State participating in the program, health facilities may submit proposed capital expenditures to the §1122 review process. Approval under §1122 guarantees that HEW will not deduct as unnecessary expenditures those amounts attributable to depreciation, interest, and other expenses related to the capital expenditure from the federal reimbursement for patient care under the HEW administered Medicare, Medicaid, and Title V programs (42 U.S.C. §§ 1395, 1396, and 701). Denial of approval means that the facility will be denied such reimbursement unless the Secretary of HEW determines that there are compelling reasons to permit such reimbursement (42 U.S.C. §1320a-1(d); App. 119a-120a). Some 38 States have entered into such agreements with HEW.

In March 1976, the Wilmington Medical Center (hereinafter "WMC"), which is the primary provider of hospital services in New Castle County, Delaware, applied to the §1122 State agency (hereinafter "the DPA") for approval for a major shift of hospital services in the County. Specifically, WMC proposed to close two of its three hospital facilities within the City of Wilmington, reduce the inpatient service at the third facility to 240 beds, and construct a new 800 bed facility in a sparsely populated area of the County, some eight and one half miles from the City. After receiving the favorable but qualified recommendation of the local health planning agency,[1] the DPA approved the proposal under §1122.

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1 Section 1122 provides for the review and recommendation of local nonprofit planning agencies (42 U.S.C. §1320a-1(b)(2); App. 115a). In the instant case, the local agency commented favorably, providing the total construction cost did not deviate more than 5% from its projected cost.

Individual petitioner Thomas Carroll, on behalf of himself and organizational petitioner WUN, wrote to HEW, inquiring into the procedures available on that level to appeal the DPA decision. Carroll was informed in writing that, if a DPA has approved a project, HEW

> "...does not address the question of whether the proposed capital expenditure is in accordance with the plans, criteria, and standards. The question has, under the statute and regulations, been decided at the State level, and such decision is not reviewable in the Department...."

On August 6, 1976, HEW approved the relocation plan for §1122 purposes. On February 5, 1977, petitioners filed a timely request, with supporting documents, for reconsideration by HEW of its August 6, 1976 approval of the relocation plan. Included were allegations that the DPA had violated and/or ignored the standards set down in the federal regulations and the federally-approved health plans.

In the period between the initial HEW approval and the filing of the request for reconsideration, an action was filed in the U.S. District Court for the District of Delaware, challenging the relocation plan as violating Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d), §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), and the environmental impact statement requirements of the National Environmental Policy Act of 1968 (42 U.S.C. §4332(c)). (NAACP et al. vs. WMC et al., No. 76-298 D.Del.). HEW (a defendant in that action) took the position, inter alia, in a motion to dismiss, that it had not violated its statutory obligations because under the §1122 statutory scheme HEW has no authority to review approvals by State §1122 agencies on the merits for any reason. The District Court initially avoided the §1122 issue, ordering HEW to reconsider its position as it related to the NEPA cause and to investigate the civil rights causes for

other reasons (426 F.Supp. 919).[2]

In July 1977, HEW filed a report on the civil rights causes, finding that the relocation plan would violate Title VI and §504, but that certain changes (which would include changes necessitating capital expenditures) would bring WMC into compliance. Pursuant to the scheme of Title VI and §504, HEW entered into negotiations with WMC to seek voluntary compliance. During the course of the negotiations HEW wrote a letter to WMC,

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2 In May 1977, HEW filed a report on the NEPA cause, finding a significant impact on the environment but retaining its position on its lack of authority to review DPA approvals under §1122, and consequently asserting the inapplicability of the environmental impact statement requirements of NEPA as there was no "major federal action." Cross-motions for partial summary judgment on that cause led to the District Court's adoption of the HEW position (436 F.Supp. 1194). That action was affirmed by the Third Circuit (584 F.2d 619). The key to both decisions was the legal conclusion that HEW had no power to review a DPA approval under §1122 for any substantive reason.

in which it stated, inter alia, that it expected the modifications which were being negotiated to "be submitted to local and other planning agencies as addenda" to the relocation plan.

On September 7, 1977, some seven months after the Request for Reconsideration had been filed, HEW responded. While reiterating the position that HEW did not have the authority under §1122 to make an independent finding on the merits of the relocation plan, HEW interpreted its own regulations and concluded that

> "compliance with the July 5, 1977, findings of the Office for Civil Rights, Region III will alter the capital expenditures proposed sufficiently to require a new capital expenditure review under section 1122 of the Social Security Act."

On September 30, 1977, HEW Secretary Califano received a letter from Irving Shapiro, Chairman of the Board of the DuPont Company and an unofficial economic advisor and friend of President Carter, in which Shapiro forwarded and endorsed the request by WMC officials that Califano

"rectify the error of the [HEW] reconsideration." The Shapiro letter was stamped "PRIORITY" and notations were placed on it directing that copies be routed to several officials in the Office for Civil Rights of HEW and to its Philadelphia regional office and that the Office of General Counsel prepare a reply for the Secretary's signature by October 5, 1977.

Petitioners have never been permitted to engage in discovery to ascertain the internal actions precipitated by the Shapiro request. However, the external response by HEW was immediate and direct. First, on October 12, 1977, HEW issued a letter in which it modified its September 7, 1977 position. Describing its action as a "clarification," HEW reversed its September 7, 1977 decision that WMC's compliance with the civil rights findings would require a new §1122 review of the relocation plan. And, secondly, on November 1, 1977, WMC and HEW entered into an agreement on modifications of the relocation plan,

intended to bring that plan into compliance with Title VI and section 504. Those modifications which related to capital expenditures were the same as those earlier identified by HEW, i.e., commitments by WMC to provide a transportation system free-of-charge to patients, employees, and visitors and to renovate the facility left behind in the City, no matter what the cost of either commitment. However, the agreement did not provide that the plan would be submitted for approval to the State and local planning agencies as HEW earlier indicated would be required.[3]

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3 Following the HEW/WMC agreement, the District Court decided that the beneficiaries of Title VI and §504 did not possess private rights-of-action, but were limited to challenging the HEW/WMC agreement under the "arbitrary and capricious" standard for agency review under 5 U.S.C. §706(2)(A). Subsequently, the District Court held that the agreement was not arbitrary and capricious (453 F.Supp. 280) and that the plaintiffs were not denied due process by the denial of an evidentiary hearing before the agency (453 F. Supp. 330). In June 1979, the Third Circuit reversed the decision of the District Court on the private right-of-action issue and remanded the case for an evidentiary trial in District Court (559 F.2d 1247). A decision following trial on the civil rights issue is pending from the District Court.

On November 11, 1977, petitioners instituted this action in Federal court. Among the causes alleged were: (1) a challenge under §1122 to the DPA approval of the relocation plan on a basis that the DPA violated the federal regulations, standards and criteria, and federally-approved health plans in reaching its decision; (2) a challenge to the HEW reversal in October 1977 of its September 1977 decision on the basis that the reversal was reached not on the merits, but rather as the result of pressure on the Secretary from an outside advisor and friend of the President, which corrupted the decision-making process. Jurisdiction of the District Court on these causes was based on 28 U.S.C. §§ 1331 and 1361.

Following motions to dismiss, the District Court concluded, inter alia, that both these causes were precluded from review (App. 68a-70a, 73a-78a). With respect to the cause involving the improper influence of a personal friend and advisor to the President, the District

Court held that, even if true, that cause was precluded from review by the express language of §1122(f) which provides

> "A determination by the Secretary under this section shall not be subject to administrative or judicial review." (App. 120a)

With respect to the DPA, the District Court, acknowledging that there was no express preclusion of DPA determinations, found that Congress' preclusion of review of HEW determinations under §1122(f) evidenced an intent to avoid all Federal interference with substantive planning decisions of State agencies under §1122, judicial as well as executive (App. 77a-78a).

On appeal, the Third Circuit affirmed, with Judge Adams dissenting on the issue involving the implied preclusion of the cause against the DPA (App. 22a-33a). With respect to whether the express preclusion provision would reach a cause concerning improper influence in the decision-making process, the Third Circuit found it "manifestly unreviewable" under §1122(f). Despite the fact that the case was decided on a motion to

dismiss, the Court bolstered its position by distinguishing the improper influence cases upon which petitioners relied, finding that "the nature and degree of the pressures exerted in those cases were significantly different" (App. 13a-15a).

With respect to whether preclusion may be implied on the cause involving the DPA, the panel majority, just as the District Court, found congressional intent to preclude all federal interference, judicial as well as executive, in the express preclusion clause involving HEW and in language of a House Committee report referring to State autonomy (App. 15a - 18a). In response to petitioner's contentions concerning the needs of uniformity in the administration of a federal program, the majority simply rejected the "underlying premise that the program is a 'federal' one" (App. 17a-18a).

In dissent on the DPA issue, Judge Adams disagreed with the contention of the majority as to the federal nature of

the federally established and funded §1122 program (App. 26a-28a). He applied the standards set down by this court with respect to implying a preclusion of judicial review and found no clear and convincing evidence that Congress intended to foreclose review of decisions of State agencies, alleged to be violating federally established standards and guidelines in administering a program established under a federal statute (App. 33a).

REASONS FOR THE WRIT

Summary of Reasons

The Court below has decided that a cause of action involving improper influences upon the decision-making process is precluded from judicial review notwithstanding the limitations of the preclusion provision. The decision is in conflict with applicable decisions of this Court. When a provision of a federal statute precludes judicial review of decisions of the agency head under the statute, decisions which were reached as

a result of improper influences which corrupted the decision-making process were not made under that statute; therefore, the cause is not precluded from judicial review. Cf., Johnson v. Robinson, 415 U.S. 360 (1974); Weinberger v. Salfi, 422 U.S. 749 (1975).

Alternatively, the Court below has decided an important question of federal law which has not been, but should be, settled by this Court. In Morris v. Gressette, 432 U.S. 491, 507, fn. 24 (1977), the Court noted, but did not have to decide, the issue whether the improper relinquishment of responsibility by an agency head would be subject to judicial review notwithstanding a finding that Congress intended preclusion of judicial review. The instant case squarely raises the more extreme issue: does a decision reached, not by impartial consideration of statutory criteria, but as a result of external pressure, so corrupt the decision-making process that the charge must be subject to judicial review as a matter of public policy unless a preclusion

clause explicitly precludes review of such charges?

Secondly, a panel majority in the Court below has decided that judicial review of the actions of a State agency to which federal decision-making authority has been delegated is precluded, notwithstanding the absence of an express preclusion provision and the absence of any legislative history and statutory purpose supporting the implication of preclusion. This decision is in conflict with controlling principles of law established by this Court concerning the presumption of judicial review. See, Barlow v. Collins, 397 U.S. 159, 166-7 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 U.S. 136, 140-1 (1967); Dunlop v. Bachowski, 421 U.S. 560 (1975).

Further, the decision of the panel majority raises serious questions of federal supremacy and uniformity of administration of federal regulations and a federal program. The absence of judicial review of all State agency actions applying the §1122 regulations, when the federal executive lacks the authority to review deviations, means

there is no way to assure uniformity in the interpretation and administration of federal regulations across the country. The decision of the panel majority dismissing petitioner's uniformity argument by asserting that the program is not a federal program misreads the statute and regulations and conflicts with the conclusion of the U.S. District Court for the Northern District of Indiana, which decision was affirmed, without opinion by the Seventh Circuit. See, Lakeside Mercy Hospital v. Indiana State Board of Health, 421 F.Supp. 193, 201 (1976), aff'd 547 F.2d 1170 (1976). The questions for this Court on this issue thus are: (1) whether the Third Circuit has departed from the presumption of reviewability well-established by the decisions of this court; (2) whether the panel majority in the Third Circuit in this case or the Seventh Circuit in the Lakeside Mercy case is correct in asserting that the issues raise federal questions under a federal program; and/or (3) whether public policy dictates that the presumption of judicial review

applies in the absence of an explcit preclusion clause when there is no other way to assure uniformity in the interpretation and administration of a federal statute and regulations.

Reasons

1. Congress has not precluded all instances of judicial review under the §1122 program by the limitation set forth in §1122(f). Only actions which constitute determinations by the Secretary "under this section" are precluded from judicial review. This Court has given no broader interpretation to the language of a preclusion provision than it literally demands. In Johnson v. Robinson, 415 U.S. 360, 367 (1974), this Court held that a provision precluding review of decisions under a statute did not reach constitutional challenges as,

> [a] decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. Appellee's constitutional challenge is not to any such decision of the Administrator, but rather to a decision of Congress...

This position was reaffirmed the following year by this Court when it drew a distinction between statutes which preclude judicial review entirely and those which are limited to a preclusion of review of an administrator's decision under the statute. Weinberger v. Salfi, 422 U.S. 749 (1975).

That distinction is relevant herein. A determination by the Secretary under §1122 is limited to those considerations which Congress intended to be included in his responsibilities. Under the HEW interpretation of those responsibilities, accepted by the District Court and the Third Circuit, when a DPA has approved a project, the Secretary's responsibilities are limited to a determination that the procedural timeframes have been followed. They do not even include a determination whether the DPA followed the standards set forth in the federal regulations in approving the project. Certainly, a determination by the Secretary under §1122 would not include as a consideration the influence of a

powerful advisor and friend of the President, as such would be a "consideration that Congress could not have intended to make relevant" D.C. Federation of Civil Associations v. Volpe, 459 F2d 1231, 1247 (D.C. Cir., 1972) .

As the D.C. Circuit in Volpe made clear, the fact that Congress had delegated authority to administer a statute to an agency does not make every decision of that agency valid. In context of invalidating an action of the Department of Transportation because of the intrusion into the decision-making authority of a powerful Congressman, the D.C. Circuit stated, "...the Secretary must reach his decision strictly on the merits and in the manner prescribed by statute, without reference to irrelevant or extraneous considerations" (459 F2d at 1248). Nothing is more outside the appropriate procedure,[4] or more irrelevant

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4 Under the §1122 regulations, decisions on reconsideration "will be based upon the record of the proceedings." 42 C.F.R. §100.108(d)(2). (See App. 131a-132a).

to an interpretation of the §1122 statute, than the influence of a powerful economic and political figure. A decision made in that way and on the basis of that influence is not one made "under the statute."

2. The principles set forth by the D.C. Circuit in Volpe appear sound, i.e., that a decision would be invalid if based in whole or in part on the pressures emanating from a powerful political figure external to the decision-making process. See also, Texas Medical Association v. Mathews, 408 F.Supp. 303 (W.D. Tex., 1976). The attempt by the Third Circuit to distinguish those cases from the instant case on the facts is irrelevant at this stage of the proceedings, as petitioners have never been accorded an opportunity to establish the facts. For example, what if the evidentiary record would establish that the decision-maker was told that he would be fired unless he reversed his earlier decision that the §1122 regulations required a new review? What if it could be established that the reversal was ordered because the President wanted to satisfy the wishes of his friend

and unofficial economic advisor? There is certainly something of a highly unusual nature when a decision, reached after seven months of deliberation, is precipitiously reversed after the intrusion of powerful influences outside the statutorily authorized decision-making process. Petitioners are entitled to develop their record before the courts distinguish precedent on the facts.

The quesiton thus is, whether a preclusion of review provision, which does not explicitly preclude review of improper influence or corruption causes, nevertheless precludes those causes. While the issue was raised in a footnote discussion in Morris v. Gressette, 432 U.S. 491, 507, fn. 24 (1977), the focal point of that discussion was a response to a "parade of horribles" suggested in the dissenting opinion. There were no improper or corrupt influences in fact in Morris, just an incorrect decision of the Attorney General. Totally apart from whether a determination of the Secretary as a result of corrupt

influences is one "under the statute," this Court should decide whether, as a matter of public policy, any preclusion of review clause which does not explicitly reach corruption charges should nevertheless be interpreted to prevent judicial review of such charges.

3. As often stated by this Court, judicial review of a final agency action by an aggrieved person is the rule and nonreviewability an exception which must be demonstrated by "clear and convincing" evidence that Congress intended preclusion. See, e.g., Barlow v. Collins, 397 U.S. 159, 166-7 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-1 (1967); Dunlop v. Bachowski, 421 U.S. 560 (1975). In the case of a review of determinations by the DPA, there is not only no express preclusion of review, there is no clear and convincing evidence from which preclusion can be inferred.

The legislative history is devoid of any intention to preclude review of actions of the DPA. The sole legislative

reference by the panel majority to support a finding of legislative purpose is to language in the House Report that "the bill would in no way change the autonomy or authority of existing State or local planning agencies" (App. 15a-16a). That opinion, however, ignores the fact that disapprovals by State agencies can be reversed by HEW (see, 42 C.F.R. §100.108(a); App. 128a-129a) and that reversals of denials would no less interfere with the "autonomy or authority" of the State agency than reversals of approvals. It would appear, as suggested by Judge Adams, that the autonomy language "simply means that the federal government was not attempting to preempt the field of health planning or to abolish existing State efforts" (App. 28a). Indeed, §1122 is not a mandatory program; it is only if States wish to receive federal reimbursement for their planning programs that they must comply with the federal statutory and regulatory requirements.

The panel majority also attempts to find legislative purpose in agency regulations which it describes as indicative of congressional intent that there be a streamlined procedure (App. 17a). Suffice it to say, these are, at best, regulations of the agency, not the Congress. The Congressional purpose explicitly provides that its purposes are to encourage health planning and to insure that unnecessary expenditures under federal health programs do not occur (see, 42 U.S.C. §1320a-1(a); App. 114a). There is no statement concerning streamlined guarantees of reimbursement to providers stated in the statute.

The panel majority further suggests that it would be incongruous to provide federal judicial review of DPA decisions, while precluding federal judicial review of the decisions of the federal administrator. What that suggestion ignores is that the decisions of each level are different and independent of one another, a position otherwise recognized by that

Court in both this case and in the earlier one concerning the interface of §1122 with NEPA (NAACP et al. v. WMC et al., 584 F2d 619. Further, one must presume Congress knew what it was doing; it precluded review of the HEW determinations clearly and simply, but did not preclude the review of the DPA separate and independent decisions. To find a preclusion of DPA decisions is to rewrite legislation. The courts below thus departed from the fundamental principle that it is Congress, not the courts, which write legislation.

4. Moreover, there is a fundamental policy difference which the panel majority rejects. It would leave to State agencies the interpretation and application of federal regulations, with the possibility that there could be 50 different interpretations and applications.[5] The federal

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5 This possibility is not just theoretical. The Pennsylvania DPA and Delaware DPA interpret the meaning of the §1122 regulation dealing with "the obligation of the capital expenditure" differently, i.e.,

(continued next page)

agency has taken the position, as reflected in its regulations, that when a DPA approves a project, HEW has no authority to make a substantive review (42 C.F.R. §100.108(a); see App. 128a-129a), a position endorsed by the Third Circuit. In that context, there is no uniformity in the interpretation and administration of a federal law and program across the country.

The panel majority dismisses that argument, by asserting that the program is not a federal program. In doing so, it ignores the fact that it is a federal statute, federal operation monies, and totally pervasive federal standards which have been put into issue by the allegations of the complaint raised in this petition. That conclusion of the panel majority also differs from one of the Seventh Circuit, which affirmed without

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(footnote continued from previous page)

in Pennsylvania, the construction management contract which WMC signed would have been declared insufficient and the §1122 approval would have terminated (see Joint Appendix to the Third Circuit, pp 420-430).

opinion the decision of the U.S. District Court for the Northern District of Indiana that allegations concerning the non-compliance of a §1122 agency present a federal question, as the "controversy involves the construction of a federal statute and the regulations issued thereunder." See Lakeside Mercy Hospital v. Indiana State Board of Health, 421 F.Supp. 193, 201 (1976), aff'd 547 F.2d 1170 (1976).[6]

As State laws, regulations, and policies which violate the federal statute under which the program operates are invalid under the Supremacy clause (see Townsend v. Swank, 404 U.S. 282, 286 (1971)), the absence of any federal review, either executive or judicial, raises policy concerns of administration.

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6 As noted in Lakeside, the State courts in Indiana held that §1122 is a federal program not subject to State review. A similar position has recently been taken in Pennsylvania. See Sarah A. Todd Memorial Home v. Comm. of Pa. Dept. of Health, — Pa. Cmwlth. —, 410 A2d 404 (1980).

In the absence of an explicit preclusion clause, no such preclusion which would permit multiple and varied interpretations of a federal program should be inferred.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

VOLUME I

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2633

WILMINGTON UNITED NEIGHBORHOODS, EDITH BECK, JOHN J. & FRANCES BRADLEY, JOSEPH J. BREEN, THOMAS X. CARROLL, JOSEPH G. DiPINTO, ETHEL B. TYNES, ALICE WILSON,
Appellants

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AMOS M. BURKE, as Director of the Bureau of Health Planning and Resources Development, ROBERT H. SWEENEY, DELAWARE HEALTH COUNCIL, INC., WILMINGTON MEDICAL CENTER, INC.

(D.C. Civil No. 77-0439)

No. 78-2634

WILMINGTON MEDICAL CENTER, INC., a non-profit corporation of the State of Delaware

v.

JOSEPH A. CALIFANO, JR., as Secretary of the Department of Health, Education and Welfare
and
WILMINGTON UNITED NEIGHBORHOODS, (Defendant-Intervenor), *Appellant*

(D.C. Civil No. 77-0480)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued: September 4, 1979
Before: ADAMS, HUNTER and HIGGINBOTHAM,
Circuit Judges
(Filed February 6, 1980)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This appeal represents the latest chapter in a long battle by consumers of medical services to prevent the removal and relocation of hospital services from the inner-city to suburban Wilmington. The plaintiffs have appealed from orders granting various motions dismissing their case against the U. S. Department of Health, Education and Welfare (HEW), the Bureau of Comprehensive Health Planning of Delaware (BCHP) and the

Wilmington Medical Center, Inc. (WMC). The court below held that it was precluded by Section 1122(f) of the Social Security Act, 42 U.S.C. §1320a-1(f), from considering the appellants' challenges to certain administrative determinations made by the Secretary of HEW and the BCHP. It also held that the appellants, as consumers of medical services and not proponents of capital expenditures, were not entitled to a hearing under Section 1122 and therefore were not denied equal protection under the fifth and fourteenth amendments. We will affirm.

I.

The Wilmington Medical Center, Inc. (WMC) is a private, nonprofit hospital and the primary provider of hospital services in New Castle County, Delaware. For several years, WMC has engaged in extensive planning to determine how best to restructure the hospital system in order to improve health care delivery. The product of this planning was Plan Omega, an $88 million capital expenditure program that would relocate major components of WMC's medical system to an outlying suburban location. The capacity of a remaining inner city facility would be reduced to approximately 250 beds.

WMC and its controversial Plan Omega are not strangers to this court. In *NAACP v. Medical Center, Inc.*, 584 F.2d 619 (3d Cir. 1978), the plaintiffs — individuals and organizations representing the poor, the elderly, the handicapped, and several racial and ethnic minorities of Wilmington — argued unsuccessfully that HEW's approval of the Medical Center's capital expenditure plan constituted major federal action requiring the preparation of an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4361. In *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979), the same plaintiffs subsequently asserted that they had a private right of action to challenge the proposed health facility relocation for its

alleged discriminatory impact. Finding that Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, created private rights of action for plaintiffs who seek relief other than funding termination, this court reversed the dismissal of the district court and remanded the cases to the district court for a trial on the merits.

The attack on Plan Omega in this case is directed at the approval of the Plan by HEW and various state agencies under a system established by Section 1122 of the Social Security Act, 42 U.S.C §1320a-1.

a. Statutory Background

Section 1122 is a program designed to curb unnecessary capital expenditures by hospitals and other health care facilities. In general, this goal is accomplished by requiring hospitals to secure advance approval of their capital projects from state health care planning agencies. Health facilities that submit plans of proposed capital expenditures to the State and subsequently have them approved are reimbursed with federal funds for that portion of a patient's bill constituting capital costs, that is, depreciation, interest or return on equity capital.

The State of Delaware has entered into such an agreement with HEW and designated the BCHP as the State's designated planning agency (DPA) to carry out its responsibility under Section 1122. Under the statute, the DPA is charged with reviewing proposed capital expenditures to determine whether they are consistent with the standards or plans developed to meet the need for adequate health care facilities in the area of the state affected. 42 U.S.C §1320a-1(b). The DPA is required to consult with local health planning agencies interested in a particular proposal and to submit to the Secretary of HEW the findings of those agencies on the proposed expenditure and the DPA's own findings and recommendations, along with any supporting materials deemed

necessary by the Secretary. *Id.* The DPA is also required to establish procedures for affording proponents of a capital expenditure found to be unnecessary "an opportunity for a fair hearing." 42 U.S.C. §1320a-1(b)(3).

Following its approval by the DPA, the Secretary then performs the ministerial act of assuring that the proper procedure has been followed. If, however, the expenditures have been found by the DPA to be inconsistent with the state or local health care facility needs or plans, the Secretary may, in certain limited instances, override the State's recommendation. 42 U.S.C. §1320a-1(d)(2). Finally, Section 1122(f) provides:

> Any person dissatisfied with a determination by the Secretary under this section may within six months following notification of such determination request the Secretary to reconsider such determination. A determination by the Secretary under this section shall not be subject to administrative or judicial review.

42 U.S.C. §1320a-1(f). This provision and its meaning are at the heart of this appeal.

b. Facts

On March 19, 1976, WMC sought Section 1122 approval for Plan Omega. As required by the statute, WMC made an application to the Delaware BCHP and to a local health planning group for review of the relocation plan. Following a substantive review of Plan Omega, the state and local agencies certified it as necessary.[1] The

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1. Public hearings were held on May 3, 4 and 5, 1976. On June 3, 1976, the Health Planning Council, Inc., a local health planning agency responsible for submitting comments on Section 1122 applications, recommended that Plan Omega be approved. On June 15, 1976, the Interim State Comprehensive Health Planning Council found that Plan Omega was consistent with the applicable state health plans. The DPA's Advisory Council voted to approve Plan

DPA forwarded its finding to the Secretary who then issued a Section 1122 approval of Plan Omega in August of 1976. As a result of this approval, WMC was assured that the Secretary would not withhold payment of the capital component of WMC's charges to patients under Medicare, Medicaid, and child health programs on the ground that the component charge was the product of an unnecessary capital expenditure.

On September 10, 1976, the complaint, challenging Plan Omega under Title VI of the Civil Rights Act, was filed in the district court. On January 19, 1977, the district court ordered HEW to investigate the charges of those plaintiffs that Plan Omega was in violation of Title VI and Section 504 and to report its findings back to the court. 426 F.Supp. 919 (D.Del. 1977).

On July 5, 1977, during the course of that litigation, the Secretary of HEW, through the Office for Civil Rights (OCR), found Plan Omega in violation of Title VI. The Secretary indicated that Plan Omega might comply with Title VI and Section 504 if WMC made certain changes in the Plan. As a result, a contract was executed between WMC and HEW on November 1, 1977 in which WMC agreed: to provide a transportation system for patients, employees, and visitors between the urban and suburban locations; to institute a patient allocation system for services that were available at both locations; and to alter construction and renovation plans in order to accommodate handicapped persons.

In the interim, on February 4, 1977, the plaintiffs in the instant case exercised their statutory prerogative under Section 1122(f) by requesting the Secretary to re-

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Omega, and subsequently the DPA announced its finding that Plan Omega was consistent with the applicable state health plans. On June 16, 1976, the DPA informed WMC of this finding. Wilmington United Neighborhoods thereafter requested information concerning its right to appeal the DPA's findings; the request for a hearing was denied.

consider his August 6, 1976 determination to approve Plan Omega under Section 1122. On September 7, 1977, Harold Margulies, M.D., Acting Administrator of the Health Resources Administration of HEW, responded to the request for reconsideration and affirmed the prior determination of August 6, 1976 which approved the plan. Dr. Margulies' letter stated that if WMC agreed to make the modifications required to comply with Title VI and Section 504, it would have to submit the modified Plan Omega in its entirety to the BCHP for another Section 1122 review. On October 12, 1977, however, Dr. Margulies disavowed such an interpretation stating that any such reconsideration would be inconsistent with the Section 1122 program regulations. He stated further that if changes were made in Plan Omega to satisfy OCR, those changes would be subject to Section 1122 review only to the extent that any one or more of them amounted to a "capital expenditure" as defined by the regulations[2] and were deemed by the DPA to warrant review.[3]

On November 11, 1977, Wilmington United Neighborhoods (WUN) initiated *Wilmington United Neighborhoods, et al. v. Department of Health, Education and Welfare, et al., (WUN v. HEW)*, (No. 78-2633), seeking to invalidate the approvals under Section 1122 of Plan Omega by HEW and the state and local health planning agencies on the grounds that they had violated their du-

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2. The regulations define a "capital expenditure" as:

> an expenditure . . . which, under generally accepted accounting principles, is not properly chargeable as an expense of operation and maintenance and which (i) exceeds $100,000, or (ii) changes the bed capacity of the facility with respect to which such expenditure is made, or (iii) substantially changes the services of th|at| facility . . .

42 C.F.R. §100.103(a)(1).

3. The DPA has discretion to exempt from review changes involving only costs. 42 C.F.R. §100.103(2)(v).

ties as mandated by Section 1122 and the fifth and fourteenth amendments to the constitution. On December 22, 1977, WUN amended its complaint naming WMC as a party-defendant, seeking, *inter alia*, a declaration that WMC had violated regulations implementing Section 1122 on several grounds.

WMC initiated *Wilmington Medical Center, Inc. v. Califano, (WMC v. Califano)* (No. 78-2634) arguing in its complaint, which was accompanied by a Motion for a Temporary Restraining Order, that the litigation challenging Plan Omega amounted to a de facto injunction since it precluded WMC from obtaining favorable financing. WMC requested, *inter alia*, a declaration that the time within which WMC was required by regulation to secure a contract for its proposed capital expenditure be tolled during the pendency of litigation challenging Plan Omega. On December 13, 1977, the district court denied WMC's Motion for a Temporary Restraining Order and granted WUN's motion to intervene as a party-defendant in *WMC v. Califano*. On December 14, 1977, one day before Section 1122 approval was to lapse, WMC signed a contract with the Gilbane Building Company. On December 27, 1977, five days after the amended complaint in *WUN v. HEW* was filed naming WMC as a party-defendant, WMC filed an Answer, Cross-Claim and Counterclaim in *WMC v. Califano*, in which it raised all the same issues that had been raised in *WUN v. HEW*. The only distinction, therefore, between the two cases is the claim by WMC for a declaratory judgment against HEW. This latter claim was denied, and no appeal taken.

The district court rejected all of WUN's claims and granted all of the motions for summary judgment that had been filed against WUN by the defendants. 458 F.Supp. 638 (D.Del. 1978). This appeal followed.

II. Standing

We address first the threshold question of whether the appellants have standing. At the outset, we note our agreement with the oft-quoted language of Justice Douglas that "[g]eneralizations about standing to sue are largely worthless as such." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1960). However, out of this muddled area of the law, two inquiries for determining standing can be distilled: whether the plaintiffs have shown an injury to themselves that is likely to be redressed by a favorable decision[4] and whether the interest sought to be protected "is arguably within the zone of interests to be protected or regulated by the statute . . ."[5]

The appellants are residents of Wilmington and consumers of health services. WMC is at present the primary provider of health care services in Wilmington. Its Plan Omega would result in the relocation of a substantial portion of the hospital services presently offered Wilmington's residents. The Department of HEW and the various state and local planning agencies approved Plan Omega for Section 1122 purposes. As a result of this approval, HEW committed itself not to withhold the capital cost component of WMC's charges to patients under Medicare, Medicaid and child health programs. The gravamen of the complaint is that the Section 1122 approval was based on improper statutory and administrative procedures and untrustworthy information; and that absent such approval, Plan Omega is not financially feasible.[6]

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4. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151-152 (1960); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

5. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. at 153. *See also*, Warth v. Seldin, 422 U.S.490, 498, 500 (1975).

6. The appellees argue that there is no substantial likelihood that WMC will be deterred from proceeding with the completion of Plan Omega by reason of the vacating of the DPA's approval. How-

Thus, it is clear that the Section 1122 approval could result in the loss to the plaintiffs of "necessary, accessible and cost efficient health care."[7]

Section 1122 denies reimbursement for unnecessary capital expenditures in the hope of promoting rational health planning and cost containment. Implicit in this legislative scheme is the assumption that more efficient use of health care dollars results in more effective delivery of health care services. We believe that the appellants, as consumers of health care services in Wilmington, have a sufficient stake in the outcome of this controversy and are clearly within the zone of interests Section 1122 was designed to protect.

III. Claims Against HEW

Two claims against HEW are pressed on appeal. The first is that HEW violated its obligation under Section 1122 by failing to determine whether the approval of Plan Omega by the DPA was consistent with federal standards and criteria and federally-approved plans.

We begin with an examination of the controlling precepts:

> "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." A clear command of the statute will preclude review; and such a command may be inferred from its purpose. . . . It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review.

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ever, in WMC v. Califano, WMC alleged that the termination of the Section 1122 approval exposes WMC to the risk of loss of reimbursement of capital expenditures from federal funds, and absent such reimbursement, the proposal is not financially feasible. Complaint ¶¶27 and 28.

7. WUN's second amended complaint ¶3.

Barlow v. Collins, 397 U.S. 159, 166-167 (1970), quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141 (1967). The command of Section 1122(f) cannot be clearer. It provides in the clearest of terms that "[a] determination by the Secretary under this section shall not be subject to administrative or judicial review."

In order to avoid the unequivocal bar to judicial review provided in Section 1122(f), the appellants assert a distinction between "substantive" and "procedural" determinations by the Secretary. That is, because "the issue goes to the power to make determinations, not the determination itself," Brief of Appellants at 24, Section 1122(f) does not preclude review. We disagree and find no support either in the statute or in its history to support such an ethereal distinction.

In *Briscoe v. Bell*, 432 U.S. 404 (1977), the Supreme Court rejected a similarly artificial distinction. At issue in that case was Section 4(b) of the Voting Rights Act of 1965 which provides that a determination of the Attorney General or Director of the Census that a State is covered by the Act "shall not be reviewable in any court." The lower courts in that case had held that notwithstanding this language there was jurisdiction to consider the "pure legal question" whether the executive officials had correctly interpreted an Act of Congress. The Supreme Court unanimously reversed stating "[t]he language is absolute on its face and would appear to admit of no exceptions." *Id.*

The appellant's argument also rests on the erroneous premise that the Secretary is empowered to perform an independent review of the DPA's findings. As this court held in *NAACP v. Medical Center, Inc.*, 584 F.2d at 628, the Secretary has mere ministerial duties where a state has approved an application; he therefore lacks discretionary power to override the decision of the DPA once the state agency has approved, by proper procedure, a proposed capital expenditure.

The second claim made against HEW implicates the integrity of administrative decision making. The appellants argue that HEW reversed its earlier determination that Plan Omega, as modified to comply with the findings of the Office for Civil Rights, required a new Section 1122 review "on the basis of the influence of a personal friend of the President," Brief of Appellant at 20, and that this claim is not within the reach of Section 1122(f)'s preclusion of review provision.

The claimed influence was in the form of a letter received by Secretary Califano on September 30, 1977 from Irving Shapiro, Chairman of the Board of the DuPont Company.[8] The appellants variously describe Shapiro as an "unofficial economic advisor to the President," Brief of Appellant at 13, "a close associate and personal friend of the President," *Id.* at 20, and as "a powerful economic figure, a personal friend and advisor to the President." *Id.* at 25.

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8. The full text of the letter is as follows:

> My valued associate, Joe Dallas, asked my advice on how best to place his letter before you. I agreed to send it to you, and I add my plea that you give it your attention. Its subject is of serious concern.

Joseph A. Dallas is Chairman of the Board of WMC. His letter which recited the history of Plan Omega from the August 6, 1976 approval by HEW through the request for reconsideration, concluded:

> The reconsideration, though it is factually mistaken and appears to misconstrue the Section 1122 regulations, stands as a severe threat to the financing of Plan Omega; and should a new Section 1122 approval be required, many months of further delay will result at enormous and unwarranted costs to our community.
>
> I write to ask your intervention in this unfortunate, tangled matter, with the hope that you will be able to rectify the error of the Acting Director's reconsideration, and permit us to proceed with Plan Omega upon which the future capability of WMC to continue the delivery of health care so importantly depends.

The district court held:

> As the October 12 letter to the plaintiffs' counsel illustrates, however, the Secretary based his decision on his interpretation of the statute and the regulations implementing it. The fact that HEW apparently had reached a contrary conclusion only a month earlier, or that the interpretation may be erroneous as a matter of law, or that the Secretary's decision may have been influenced by a letter from a business leader and personal friend of the President is irrelevant, because in any of those events section 1122(f) would still preclude judicial review. *See Briscoe v. Bell, supra,* 432 U.S. at 409-15.

458 F.Supp at 639 (footnotes omitted). It is clear that the Secretary determined that under the applicable regulations, no new Section 1122 review of Plan Omega would be required, even if Plan Omega was modified to comply with the finding of the Office of Civil Rights. Such a determination is manifestly unreviewable by the terms of Section 1122(f).

The cases relied on by the appellants are significantly distinct, both factually and legally, from the instant case. In *United States ex rel. Kaloudis v. Shaughnessy,* 180 F.2d 489 (2d Cir. 1950), the court affirmed a district court's refusal to grant an alien a hearing to review whether the Attorney General had abused his discretion in failing to suspend a deportation order. According to Chief Judge Learned Hand, "unless the ground stated [in the Attorney General's order] is on its face insufficient, he must accept the decision, for it was made in the 'exercise of discretion,' which we have again and again declared that we will not review." *Id.* at 490. *Texas Medical Association v. Mathews,* 408 F.Supp. 303 (W.D. Tex. 1976) and *D.C. Federation of Civil Associations v. Volpe,* 459 F.2d 1231 (D.C. Cir. 1972) involved the scope of authorized judicial review and not the power to undertake review in the face of an express statutory preclusion.

Moreover, the nature and degree of the pressures exerted in those cases were significantly different than in the instant case. In *Mathews*, the pressure was "that he must either change his position or his job would be at stake." 408 F.Supp. at 309. There was repeated and vocal public pressure by a Senator and a staff member of the Senate Finance Committee. In *Volpe*, there were clear threats of a loss of appropriations.

IV. Claims Against the DPA

The appellants also charge: that the DPA's approval of Plan Omega was inconsistent with applicable standards, criteria and plans; that DPA violated its obligations under Section 1122 by failing to consider and determine that the June 9, 1976 modification of Plan Omega required a Section 1122 review; that the DPA violated its obligations under Section 1122 by failing to consider and determine that the changes required to comply with the findings of the Office of Civil Rights required a complete review of the entire project. Because these are not "determinations by the Secretary," the plaintiffs contend that review is not precluded by Section 1122(f). The district court held that while "section 1122(f) does not expressly preclude judicial review of DPA approvals, . . . nonreviewability may be inferred from a statute's purpose and its legislative history." 458 F.Supp at 641. We agree. Congress intended with Section 1122 to contain "hospital costs by limiting federal reimbursements covering capital expenditures for health care to those expenditures to those expenditures *deemed necessary by the state*" and to encourage "rational health planning *by the states*." *NAACP v. Medical Center, Inc.*, 584 F.2d at 627-628 (emphasis supplied). The legislative history demonstrates that Congress envisioned that "[t]he bill would in no way change the autonomy or authority of existing State or local planning

agencies." H.R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Admin. News 4989, 5066. The surest way to "change the autonomy or authority of existing State or local planning agencies" is to hold that the DPA's determinations are reviewable. We decline to do so.

The district court correctly reasoned:

> Given the prohibition on judicial review of the Secretary's decision set forth in Section 1122(f), it is inconceivable that Congress could have intended the Federal Judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of a proposed capital expenditure.

458 F.Supp. at 641.

The appellants argue, however, that Section 1122 is a "federal" program which requires, for the sake of uniformity, the intervention of the federal courts. They argue further that if "the causes against the DPA are precluded from federal judicial review, it is possible to have 50 different interpretations and applications of the federal regulations." Brief of Appellants at 36. We find these arguments unpersuasive. Statutes precluding judicial review would be rendered meaningless if the federal courts could always intervene in so-called "federal" programs. Moreover, we reject the appellants' underlying premise that the program is a "federal" one. All evaluations of the merits of health programs are conducted at the state and local level. The relevant passages of the legislative history are appropriately titled "Limitation on Federal Participation for Capital Expenditures" and evidence a concern for federal *participation* in an essentially local effort rather than federal *control and direction* of a federal program. The regulations are not patterned to bring about rigid federal uniformity. On the whole, it is clear that the states' role in health care planning was not to be supplanted.

Our disagreement with the dissent is basic and fundamental. First, the dissent has failed to explain the incongruity that results from its approach — that Congress could have intended to provide federal judicial intervention and review of the state DPA decisions while at the same time precluding such federal judicial intervention and review generally of the decisions of the federal administrator, the Secretary of HEW. To allow the review of the DPA decisions as urged by the dissent disregards the fact that the DPA is a single step in an administrative decision-making process where Congress was clearly concerned about making the Section 1122 review process a streamlined procedure. *See* 42 C.F.R. §100.106(a)(2).

Second, the dissent's argument rests on the erroneous premise that the program here is a "federal" one. As we noted above, all evaluations of the merits of health programs are conducted at the state and local levels. The dissent points to the statute which provides that the DPA is to determine whether or not a proposed capital expenditure is "consistent with the standards, criteria, or plans developed pursuant to the Public Health Service Act . . . to meet the need for adequate health care facilities in the area covered by the plan or plans so developed." 42 U.S.C. §1320a-1(b). However, these "standards, criteria or plans" are developed by the states. For example, 42 C.F.R. §100.107 lists the criteria that must be identified in the agreement between HEW and the states — but only to the extent to which the states have actually developed such criteria.

Additional support for this reading comes from the legislative history of the National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§300k-300t (1976), which followed the enactment of Section 1122. The Senate Report states:

> In 1972 the role of State CHP agencies was strengthened by the Social Security Amendments of

> 1972 (P.L. 92-603). These amendments added section 1122 to the Social Security Act. It provides that health care facilities and HMOs would not be reimbursed by Medicare, Medicaid, or the maternal and child health programs for depreciation, interest or return on equity capital relating to capital expenditures that were determined by designated State planning agencies (which in most States is the 314(a) agency) to be inconsistent with standards, criteria or plans *developed by the State agencies*. This important provision related to expenditures under Medicare and Medicaid to State health planning for the first time by assuring, in effect, that Medicare and Medicaid would not support the construction of unneeded health care facilities. It was clear in the legislative history of this provision that States should use recommendations from areawide agencies to assist them in the implementation of this provision.

S. Rep. No. 1285, 93d Cong., 2d Sess. 7, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7842, 7848 (emphasis supplied).

For these reasons, we remain convinced that the DPA's approval of a capital expenditure is unreviewable under Section 1122.

The result we reach on this issue does not, under this statutory framework, totally foreclose consumer participation and input in local health planning and funding. Section 1122(b) requires that every DPA have "a governing body or advisory board at least half of whose members represent consumer interests." In this case three of the individual plaintiffs participated, along with consumers and other opponents of Plan Omega, in several public hearings held by the Interim Council during the initial review period.

V. Constitutional Claims

The appellant's final challenge concerns Section 1122(b)(3) which provides in relevant part:

> (b) The Secretary . . . shall make an agreement with any State which is able and willing to do so under which a designated planning agency . . . will—
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> * * *
>
> (3) establish and maintain procedures pursuant to which a person proposing any such capital expenditure may appeal a recommendation by the [DPA] and will be granted an opportunity for a fair hearing. . . .

Participating states are required to establish procedures by which adverse decisions of the DPA may be appealed by proponents of capital expenditures. *See* Section 1122(d)(1)(B)(ii), 42 U.S.C. §1320a-1(d)(1)(B)(ii). It does not require, however, the establishment of such appeal procedures for opponents of proposals that have been approved.

Specifically, the appellants claim that the Secretary's failure to accord opponents of a proposed capital expenditure the same appeal rights as proponents constitutes a violation of their right to equal protection as guaranteed by the due process clause of the fifth amendment. The same claim is made against the director of the BCHP under the equal protection clause of the fourteenth amendment.

The parties agree that the classification here does not impinge upon any "fundamental interest" or affect any "suspect class." The test of constitutionality, therefore, is whether the classification bears a rational relation to a legitimate state interest. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489 (1977). As the Supreme Court has noted, the inquiry under the rational relationship standard involves "a relatively re-

laxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). On these facts, we hold that the distinction drawn between the hearing rights of proponents and opponents of capital expenditures is rationally related to a legitimate governmental interest served by Section 1122.

As we noted above, Section 1122 is a program designed to curb unnecessary capital expenditures by hospitals and other health care facilities. Hospitals are required to secure advance approval from state health care planning agencies for capital expenditures in order to be reimbursed with federal funds. Thus, a finding that a proposed capital expenditure is inconsistent with state plans and needs could jeopardize the commencement and completion of health care projects. The provider would arguably be entitled to a hearing before the termination of such reimbursements. In contrast, the interests of opponents of proposed capital expenditures are so distinct that the specter of unconstitutionality is not raised.

The Section 1122 review process is designed to be a streamlined procedure and thus avoid delaying the construction of needed facilities. Thus, Congress devised a process in Section 1122(f) to preclude both judicial and administrative review. Moreover, the DPA is required to complete its review of an application within sixty to ninety days of receiving it and, if the DPA fails to render its decision within the allotted time, the application is deemed approved for Section 1122 purposes. 42 C.F.R. §100.106(a)(4).

Providing a proponent whose capital expenditure has been disapproved a fair hearing does not conflict with this clear objective for streamlined proceedings, because there has already been a finding that the proposed capital expenditure is unnecessary. Providing a fair

hearing to opponents of a proposed capital expenditure, however, would make this objective unreachable, for any number of opponents could seek a hearing on any number of grounds, with the result that a capital expenditure found to be necessary could be delayed indefinitely. The objective of having streamlined proceedings and thus not delaying indefinitely the construction of needed health care facilities therefore provides a rational basis for the statutory classification.

VI.

In ruling adversely to the plaintiffs, we are not unmindful of the plight that particularly the weak and the poor so often endure as part of their daily lives in many urban communities. Often with well-meaning intentions the services essential to the well-being of urban dwellers are modified or reduced under the claim that in some way the overall community benefits by plans which may further dilute the relatively few options in the inner city. When these options for the inner city are reduced by moving major centers or services to the suburbs, many will applaud and call the transition "progress," while those left behind who bear the greatest brunt of the change may condemn the plan as a retreat from any commitment to improve their quality of life. These are tough policy questions which reveal much about the values of a society. In dealing with these tensions and judgments we must be mindful that we sit as a judicial and not a legislative body. After reviewing most carefully the rights assured by the relevant legislative and constitutional provisions, we must conclude that under the current state of the law, as to the issues raised in this suit, the plaintiffs are remediless.

For the foregoing reasons, the judgment of the district court will be affirmed. Each party shall bear its own costs.

ADAMS, *Circuit Judge,* concurring in part and dissenting in part.

We must examine in this appeal one of the programs designed by Congress to control the rapid inflation nationwide in the cost of health care. Congress did not choose to tackle this problem by direct regulation or by expanding the federal bureaucracy. Instead it selected a more oblique method that would encourage and strengthen existing local and statewide health planning units and in some cases prompt their creation. The intricate network thereby established was one of many experiments in cooperative federal, state, and local endeavors spawned by HEW.

Health planning was originally organized by the hospital industry as a means of limiting the supply of hospital beds in a period of declining revenue during the Depression. The first national attempt to create governmental planning units and to introduce the viewpoint of the consumer was the Comprehensive Health Planning and Public Health Services Amendments of 1966.[1] Federal funds under this act were granted to local and statewide planning agencies that created advisory councils. The legislation required that a majority of the members of the councils affiliated with the planning agencies had to represent consumers.

The statute on which this case focuses, and which is referred to as §1122, was enacted in 1972.[2] Dissatisfaction with existing efforts led Congress to pass the National Health Planning and Resources Development Act of 1974,[3] which, *inter alia,* was designed to strengthen

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1. Pub. L. No. 89-749, 80 Stat. 1180 (1966) (codified at 42 U.S.C. §246 (1976)).

2. Social Security Amendments of 1972, §1122, Pub. L. No. 92-603, 86 Stat. 1386 (codified at 42 U.S.C. §1320a-1 (1976)).

3. Pub. L. No. 93-641, 88 Stat. 2225 (1975) (codified at 42 U.S.C. §§300k-300t (1976)).

even further the role of consumers in health planning and to provide more specific goals for this effort.[4]

Section 1122 evinces a legislative attempt to avoid indirect subsidization — through reimbursement for medical services under various federal programs — of unnecessary capital expenditures in the health care field. Unless a hospital or other provider obtains a §1122 approval of its plan prior to undertaking a major expenditure, it will not be reimbursed for that portion of any medicaid, medicare or other charge payable by the federal government which is attributable to the nonapproved capital expenditure.

In accordance with the statutory schema, under which the substantive decision as to approval or disapproval of a hospital's proposal is made by a state designated planning agency (DPA),[5] Delaware's DPA consulted two subagencies. One, the Interim State Comprehensive Health Planning Council, is statewide; the other, the Health Planning Council, Inc., is local. Both of the subagencies recommended approval of the plan put forth by the Wilmington Medical Center to relocate most of its services from the downtown area of the city to the suburbs. Thereupon, it is alleged, the DPA certified its approval of the proposal to HEW without making independent findings.

The question addressed here is whether any judicial review is to be available when consumers of health care, primarily those of limited means, allege that the health

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4. For a history and critique of health planning, see Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 Yale L.J. 243, 304-30 (1978).

5. For convenience, DPA, which stands for designated planning agency, refers to the two state defendants in this action: Amos Burke as director of the Delaware Bureau of Comprehensive Health Planning (the actual DPA here), and Robert Sweeney as head of the Interim State Comprehensive Health Planning Council, whose recommendation, it is alleged, was adopted by Burke.

planning system established by Congress has not worked properly and that federal law has been violated. Although I agree with the majority's conclusion that review of claims against *HEW* is statutorily barred, I cannot concur in part IV of the majority's opinion, which holds that jurisdiction over the *DPA* is precluded, nor can I agree with the overall conclusion of the majority that the plaintiffs here are remediless.

Plaintiffs, in this action for declaratory and injunctive relief, alleged federal jurisdiction under 28 U.S.C. §1331 (1976).[6] They claimed injury caused by the defendants' violation of federal law. In considering whether relief may be afforded to them, a court should be guided by the general proposition that federal tribunals have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[7] The specific task here, then, is to ascertain whether Congress has foreclosed jurisdiction by the federal judiciary when an action has been asserted against the DPA.

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6. The complaint also alleged jurisdiction under 28 U.S.C. §1361 (1976), which grants "jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Although this jurisdictional grant might apply to HEW and its officials, it cannot reach the DPA, a state agency, or its officials. See the district court's opinion, 458 F.Supp. at 628, 640 n.57 (D.Del. 1978).

7. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *See* England v. Louisiana St. Bd. Med. Examiners, 375 U.S. 411, 415 (1964) (quoting Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909)) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.") The constitutional structure of our government may, of course, weigh heavily in favor of delaying federal judicial jurisdiction for, *e.g.*, exhaustion of state or administrative remedies. But what is at stake in this case is not a delay of jurisdiction because of deference to another branch of the government or to the state on the possibility that a dispute may be settled on nonfederal or nonconstitutional grounds, but whether or not any judicial relief at all may be had for the alleged wrongs.

In concluding that there is no jurisdiction to consider the complaint here, which has been asserted by consumers of hospital services in the Wilmington area, the majority relies solely on congressional intent in enacting §1122(f). Inasmuch as the foreclosure of judicial review in §1122(f) is textually limited to "a determination by the Secretary," a claim by the plaintiffs should not be cut off unless a fair construction of subsection (f) equates action by the DPA with "a determination by the Secretary." The majority candidly acknowledges that the statute " 'does not expressly preclude judicial review of DPA approvals [of capital expenditures],' " but maintains, as did the district court, that " 'nonreviewability may be inferred from [the] statute's purpose and its legislative history.' "[8]

Yet, according to the governing principles cited by the majority, it is " 'only on a showing of "clear and convincing evidence" of a contrary legislative intent' that the courts should restrict access to judicial review."[9] The meager legislative history applicable to §1122 does not yield such "clear and convincing evidence."[10] Thus, that section cannot sustain the majority's conclusion in this regard.

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8. Majority opinion at 16 (quoting district court opinion, 458 F. Supp. at 628).

9. Barlow v. Collins, 397 U.S. 159, 166-67 (1970) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967)), *quoted in* majority opinion at 12.

10. The entire legislative history addressing subsection (f) alone consists only of one sentence paraphrasing the statute. The section as a whole is not given much more extensive explanation, and that given is not especially instructive as to the judicial review issue. *See* pp. 6-7 & note 24 *infra*. The subsequent legislative history on the section as a whole relied upon by the majority opinion at 15 seems to me to be simply a reiteration of the point that the nationwide health planning envisioned by Congress was an experiment in cooperative federalism — neither exclusively state nor federal. As such, it lends no illumination to the question whether §1122(f) was intended to cut off review of DPA decisions.

This Court has already demarcated the respective roles of the DPA and the Secretary. We have said that the state agency has a substantive duty "to assess any capital expenditure . . . to determine if [it] is consistent with the state's need for adequate health care in the area."[11] And we have also made clear that the Secretary, on the other hand, "has mere ministerial duties"[12] — *i.e.*, he has no discretion to review the DPA's substantive assessment, and may examine only the procedures employed to ensure that all the correct steps were taken.[13]

Here, the DPA is a state agency,[14] while HEW is, of course, a federal department. It is the obligation of the DPA to evaluate the proposed capital expenditure to ensure conformity with local needs as set forth in the area

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11. NAACP v. Medical Center, Inc., 584 F.2d 619, 628 (3rd Cir. 1978).

12. *Id.*

13. This Court stated:

> Our understanding of §1122 is in accord with that of the Secretary and in accord with the perceptions of the district court as well. "If [a §1122] application has received complete approval when it reaches the Secretary, he then performs the ministerial act of assuring that the proper procedure has been followed. The Secretary, however, has no discretion as to whether the proposed expenditures are unwise.
> We agree with the district court's holding that H.E.W. lacks discretionary power to override the decision of the designated state agency once the state agency has approved, by proper procedure, a capital expenditure proposal. We therefore conclude that the Secretary has mere ministerial duties in a state approved §1122 application."

Id. (quoting from the district court opinion, 436 F. Supp. 1194, 1198 (D.Del. 1978))

14. Under the statute and HEW regulations, the DPA may be a state agency, "a public or nonprofit private agency or organization" responsible for regional, metropolitan, or local health planning, or such other public or nonprofit private agency found by the state agency to be performing similar functions. 42 C.F.R. §100.105 (1978); *see* 42 U.S.C.§1320a-1(d)(1)(B)(ii)(1)(1976).

or statewide plan — a plan that must be consonant with federal statutory and regulatory guidelines. In contrast, the Secretary is simply to ensure that the statutory procedures are followed. Given this legislative arrangement, it is difficult to perceive how substantive action by the state agency may be considered part of the "determination by the Secretary."

The majority would "federalize" the DPA, for purposes of foreclosing judicial review, by finding that decisions of the state agency come within the statutory preclusion of a "determination by the Secretary." Nonetheless, according to the majority, the DPA is an autonomous state agency, and the planning encouraged by §1122 is local and not part of a federal program. Confusion regarding this matter may be attributable to the fact that although there is a bright-line distinction between the substantive decisions to be made by the DPA and the assurance of correct procedures which is the responsibility of the Secretary, the federal-state separation in the statute as a whole is not so clear. Moreover, the absence of a rigid separation seems to have been intentional, inasmuch as the DPA is to be guided in its substantive decision by a mixture of federal and local elements. General federal standards and goals are to be given more specific content in an area plan informed by local assessments of need.[15]

Following the reasoning of the district court, which was based primarily on Supreme Court decisions interpreting the Administrative Procedure Act,[16] the majority

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15. As an example, take the acquisition of computerized axial tomography body ("CAT") scanners. The federally set goal would be to avoid subsidization of unnecessary equipment. In formulating its local plan, a DPA would have to define community needs more specifically — *e.g.*, in terms of one CAT scanner per *X* number of ascertainable patient use hours, *X* amount of population, or *X* miles of radius.

16. *See* 458 F. Supp. at 640-41 & n.57 (relying on Barlow v. Collins, 397 U.S. 159 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); and 5 U.S.C. § 701(b)(1) (1976)).

bars federal judicial review of the DPA because it discerns a statutory intent to eschew federal interference in state health planning. But if, as is apparent in the statute, there is federal law to apply to the DPA, it is Congress that has intruded into state health planning, not the plaintiffs' invocation of judicial review. The majority relies in its conclusion on two passages from the limited legislative history purportedly addressing this issue.

First, reference is made to the fact that the House Committee stated in its report that the bill "would in no way change the autonomy or authority of existing state or local planning agencies."[17] But as I understand this assertion, it simply means that the federal government was not attempting to preempt the field of health planning or to abolish existing state efforts. Congress decidedly did not intend that there would be no federal control over the DPAs. By enunciating mandatory terms for the agreements between HEW and the states with regard to the DPAs, Congress established certain guidelines to govern the variables left to the states. It provided that at least half the membership of the DPA was to represent "consumers of health services";[18] procedures for notice and review of capital expenditures — as well as hearings in some instances — were specified;[19] certain other agencies were to be consulted;[20] and the standards, criteria, or plans used by the DPAs to evaluate capital expenditures were to be congruent with those statutorily

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17. H. R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4989, 5066 (quoted in majority op. at 13).

18. 42 U.S.C. §1320a-1(b)(1976).

19. *Id.* §1320a-1(b)(1),(3); *see* 42 C.F.R. §100.106 (1978) prescribing, pursuant to the statute, more detailed provisions on notice and procedure that must be in the agreements between HEW and state governors).

20. 42 U.S.C. §1320a-1(b)(2)(1976).

established in previous legislation.[21] In short, Congress promulgated rules as to the composition, procedures, and standards for decisionmaking by the DPAs.[22] These congressional commands, and not judicial review to enforce them, limit the "autonomy or authority" of the existing agencies. The DPAs, moreover, need not in all cases be state or local government agencies, but may also be private nonprofit organizations.[23]

The majority's second reference to legislative history is the observation that each paragraph of the House Report that discusses §1122 is entitled, "Limitation on Federal Participation for Capital Expenditures."[24] The body of the relevant sections, however, makes clear that the heading refers to Congress's intention to limit the use of federal money; the commentary is not aimed at limiting the federal role in health planning. Indeed, this interpretation of the congressional intent is explicit in the statute itself, which declares:

> The purpose of this section is to assure that Federal funds appropriated under [various programs] are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any of such [programs] and that, to

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21. The DPA is to determine whether or not a proposed capital expenditure is "consistent with the standards, criteria, or plans developed pursuant to the Public Health Service Act . . . to meet the need for adequate health care facilities in the area covered by the plan or plans so developed." *Id.* §1320a-1(b).

22. Congress also provided for federal reimbursement to the DPA for expenses incurred in its §1122 review. 42 U.S.C. §1320a-1(c) (1976).

23. *See* note 14 supra.

24. H. R. Rep. No. 231, *supra* note 16, at 5004, 5065, 5288 (quoted in majority op. at 17). The only specific reference to subsection (f) in the entire House report is one sentence that simply paraphrases the language of the statute. *Id.* at 5290.

> the extent possible, reimbursement under such [programs] shall support planning activities with respect to health services and facilities in the various States.[25]

Congress did not want providers of health care, such as hospitals, to be subsidized through federally financed programs for unnecessary capital expenditures. To achieve this aim, Congress created a national health planning program and set national goals and criteria.[26] It was contemplated that this experiment in national health planning would draw on preexisting state and local agencies to the extent possible, and would leave to those agencies the determination whether specific projects met local needs. Detailed decisions were to be left to the DPAs, but the process to be employed in reaching the decisions and the criteria to guide the DPA in arriving at its conclusions were set by Congress and HEW, and are to be applied nationwide.

The district court observed that "[t]he regulations and the agreement between HEW and Delaware pursuant to §1122 recognize that judicial review may be available under State law or regulation to a proponent [such as a hospital] of an expenditure disapproved by the DPA."[27] This was thought to be irrelevant to the plaintiffs' contention that the federal court has jurisdiction, because, the judge stated, (1) existence of judicial re-

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25. Social Security Amendments of 1972, Pub. L. No. 92-603, §1122(a), 86 Stat. 1386 (codified at 42 U.S.C. §1320a-1(a) (1976)). As this Court has observed, the statute has a dual purpose: "containment of hospital costs" and "encouragement of rational health planning by the states." NAACP v. Medical Center, Inc., 584 F.2d 619, 627 (3d Cir. 1978).

26. *See generally* Rosenblatt, *supra* note 4, at 304-07 (1978) (discussing evolution of congressional concerns in health planning efforts enacted prior as well as subsequent to the enactment of §1122).

27. 458 F. Supp. at 641 (citing 42 C.F.R. §100.106(c)(4) (1978).

view for a *proponent* of a capital expenditure does not indicate an intention to provide it for an *opponent*, and (2) review by state courts would be consistent with the purposes of §1122, whereas review by the federal courts would not.

The first reason appears to confuse the question whether judicial review is precluded with the equal protection issue (an issue discussed in the majority opinion at 17-19) as to a "fair hearing" within the DPA for an aggrieved proponent of a capital expenditure. It is one thing to hold, as the Court today does, that Congress may provide administrative hearings for proponents but not opponents of a capital expenditure by a medical facility. It is quite another to say, in attempting to discern congressional intent, that a DPA decision adverse to a proponent is not a "determination by the Secretary" for purposes of foreclosing judicial review, but a decision adverse to consumers is such a precluded determination.[28]

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28. Such reasoning does not comport with the language of the statute, for, as this Court has previously noted, the statute is silent as to what the Secretary does if a project is approved by the DPA. *See* NAACP v. Medical Center, Inc., 584 F.2d 619, 628 & n.13 (3d Cir. 1978). It could therefore be argued that when approval is granted, nothing is within the preclusion-of-review reach of §1122(f). The majority concludes that the DPA's approval of the Medical Center's proposal, and the Secretary's determination that the approval was procedurally sound, may not be reviewed because of §1122(f)'s reference to a determination by the Secretary under that section. Yet the only determination by the Secretary mentioned in §1122 is a determination by the Secretary when a proposed expenditure has *not* been approved by the DPA.

The sole reference to the meaning of "a determination by the Secretary under [§1122]" is subsection (d), which is headed "Determination of amount of exclusions from Federal payments." A roadmap to that complex provision would read as follows: (1) If the Secretary determines that (A) the DPA was not given notice of a proposed capital expenditure or (B) the DPA was given notice and (i) has notified the proponent within a reasonable time that the ex-

The second reason adduced by the district court appears to obscure the distinction between procedures, on the one hand, and substantive principles for planning, on the other. Yet, this important difference was carefully etched by Congress and HEW and was incorporated into the agreement between HEW and the state; the state agency is to apply federal procedures and guidelines to a local situation. The plaintiffs allege that the DPA violated federally established procedures and guidelines. Moreover, adjudication on the merits, if the Court were to reach the merits, would require interpretation of federal law, which is within the special competence of the federal courts.[29]

Note 28—(Continued)
penditure is not approved, and (ii) has, prior to that decision (I) consulted with certain other agencies and (II) granted the provider an opportunity for a hearing, *then the Secretary shall exclude from federal reimbursement any costs attributable to that expenditure.* (2) Despite the DPA's disapproval, the Secretary may still reimburse the provider if the Secretary submits the matter to a national "advisory council" and that council demonstrates the virtue of the expenditure. *See* 42 U.S.C. §1320a-1(d) (1976).

Nothing in §1122 refers to any procedure by the Secretary when the DPA *approves* the capital expenditure. The facts of this case, therefore, are totally outside the clear meaning of §1122(f)'s preclusion of administrative or judicial review. As a subsidiary point, this analysis of the core of §1122 underscores Congress's exclusive focus in the statute on the means for saving federal money.

29. At least one of the contentions of the plaintiffs is purely a matter of interpreting the federal statute. Contrary to the majority's assertion that the Secretary determined that no new §1122 review was required after the Medical Center altered its plan to comply with the finding of the Office of Civil Rights, *see* majority opinion at 14, the letter of Dr. Margulies as Acting Administrator of HEW's Health Resources Administration simply asserted that "[t]he decision whether an expenditure warrants DPA review . . . is in the first instance one for the DPA." The definition of a "capital expenditure," though, is set by the statute. 42 U.S.C. §1320a-1(g) (1976). It is questionable, therefore, whether HEW could give the DPA discretion to exempt from review, as it seems to have done in 42 C.F.R. §100.103(a)(2)(v) (1978), a capital expenditure that meets the statutory definition.

Both the district court and the majority on this appeal, perceive the issue of judicial review as a federalism conflict. The statutory arrangement establishing a functional division of labor, in which state or local entities make decisions according to federal law, is thus unnecessarily interpreted so as to draw rigid lines in this program between what is federal and what is state.

Congress's intent in the one sentence of §1122, which was part of a much larger legislative enactment, is admittedly not clear. Doubts, however, are to be resolved in favor of jurisdiction, for, as the Supreme Court has declared, the intention to foreclose review must be "clear and convincing." Because I believe that neither the language of §1122(f) nor the ascertainable congressional purpose precludes jurisdiction to adjudicate a federal cause of action brought against the DPA, I would reverse the order of the district court on this issue. In all other respects, however, I concur with the majority.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

I do not suggest that federal jurisdiction on this matter should be exclusive. Indeed, state courts have adjudicated challenges by providers to DPA decisions. *See* North Miami Gen. Hosp., Inc. v. Office of Community Medical Facilities, Dept. of Health & Rehabilitative Servs., 355 So. 2d 1272 (Fla. App. 1978); Charter Med. Corp. v. Mississippi Health Planning & Dev. Corp., 362 So. 2d 180 (Miss. 1978). *But cf.* Lakeside Mercy Hosp. v. Indiana St. Bd. Health, 421 F.Supp. 193, 198 (N.D. Ind. 1976) (reviewing DPA decision; citing dismissal of action by state court on grounds that it could not review action of DPA "where, as here, it was acting as an agency of the federal government").

Supreme Court, U. S.
FILED
MAY 6 1980
MICHAEL RODAK, JR., CLERK

APPENDIX B

VOLUME II

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,

Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILMINGTON UNITED NEIGHBORHOODS, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, et al., Defendants.	Civil Action No. 77-439
WILMINGTON MEDICAL CENTER, INC., a non-profit corporation of the State of Delaware, Plaintiff, v. JOSEPH A. CALIFANO, JR., as Secretary of the DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, Defendant, and WILMINGTON UNITED NEIGHBORHOODS, Defendant-Intervenor.	Civil Action No. 77-480

Decided September 22, 1978

[Names of Counsel omitted in printing].

O P I N I O N

LATCHUM, Chief Judge.

These actions represent another attempt by certain consumers of medical services in the Wilmington, Delaware metropolitan area to prevent the Wilmington Medical Center ("WMC") from implementing its controversial Plan Omega, which calls for the relocation of the bulk of WMC's urban hospital services to a suburban location.[1] On November 11, 1977, Wilmington United Neighborhoods, an association of Wilmington community groups, and eight individuals who are consumers of WMC's medical services (collectively "plaintiffs") instituted Civil Action No. 77-439 against the United States Department of Health, Education, and Welfare ("HEW"),

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1 WMC, which currently operates three hospitals within the City of Wilmington, is the major hospital system in northern Delaware. Plan Omega envisions the closing of two of WMC's hospitals and the construction of an 800-bed tertiary care facility (the "Southwest" Division) approximately eight miles southwest of Wilmington. For a more detailed description of Plan Omega, see NAACP v. Wilmington Medical Center, Inc., — F.Supp. — (D.Del. April 7, 1978)(slip op. at pp. 4-9).

the Delaware Health Council, Inc., and two state officials (collectively the "State defendants"), seeking to invalidate their approval of Plan Omega under Section 1122 of the Social Security Act, 42 U.S.C. §1320a-1 ("section 1122").[2] The effect of section 1122 approval is to assure a health care provider that Federal funds provided under medicare, medicaid, and programs for maternal and child health care services will not be reduced on the ground that the provider's capital expenditure program (Plan Omega in this case) was "unreasonable" or "unnecessary."[3] Plaintiffs allege that several of the actions taken by HEW and the State defendants in connection with the approval of Plan Omega violated the requirements of section 1122 and the regulations implementing it (42 C.F.R. Part 100). The complaint also asserts that defendants violated plaintiffs' right to equal protection by providing a "fair hearing" to

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2 Docket Item 1.

3 NAACP v. Wilmington Medical Center, Inc., 436 F. Supp. 1194, 1198 (D.Del. 1977), aff'd, — F.2d — (C.A.3, August 18, 1978).

proponents of a capital expenditure dissatisfied with the result of a section 1122 review, while denying disappointed opponents a similar opportunity to air their objections.

Plaintiffs later amended their complaint to add WMC as a defendant, alleging that it had violated its duties under section 1122 and the regulations implementing it by submitting unreliable financial data to the reveiwing state agencies and entering into a construction contract that authorized costs far in excess of the figure that received section 1122 approval and postponed indefinitely commencement of construction.[4] With the exception of the Delaware Health Council, Inc.,[5] all the defendants have moved to dismiss the amended complaint or, in the alternative, for summary judgment.[6]

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4 Docket Item 9 (First Amended Complaint), pars. 15, 62-64.

5 By stipulation of the parties, the time within which Delaware Health Council, Inc., shall move, answer or otherwise respond to the complaint has been extended until after the Court determines the motion currently pending in this action. Docket Item 20.

6 Docket Items 8, 15, and 17. Defendants WMC and Amos M. Burke and Robert H. Sweeney, the two state officials, filed

(continued next page)

This opinion disposes of the issues raised by those motions and plaintiffs' motions for partial summary judgment against several of the defendants, which are also currently before the Court.[7]

Under HEW's regulations, the section 1122 approval of Plan Omega was due to expire on December 15, 1977, unless on or before that date WMC incurred an obligation to build the project. On December 12, 1977, WMC filed an action against Joseph Califano, the Secretary of HEW (the "Secretary"),

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(footnote continued from previous page)

motions to dismiss only, but all of them have presented affidavits in support of their positions. See Docket Items 21 and 42. Because the Court has considered matters outside the pleadings, all the pending motions by defendants will be treated as motions for summary judgment. F.R.Civ.P. 12(b).

7 Plaintiffs have moved for summary judgment against HEW on their equal protection claim and on their claim that HEW's failure to make an independent review of Plan Omega constituted an abrogation of its duties under section 1122. Docket Item 28. Plaintiffs also seek summary judgment against WMC on the issue whether Plan Omega's section 1122 approval expired on December 15, 1977.

seeking declaratory and injunctive relief from the threatened expiration of the section 1122 approval.[8] Thereafter, Wilmington United Neighborhoods ("W.U.N."), a plaintiff in Civil Action No. 77-439, intervened as a defendant and by filing a counterclaim against WMC and a cross-claim against the Secretary asserted the same claims against those parties as it had in the first action.[9] WMC has moved to dismiss the counterclaim[10] and W.U.N. has moved for a partial summary judgment against WMC, declaring that the section 1122 certification of Plan Omega expired on December 15, 1977.[11] Because these motions and the motions pending in Civil Action No. 77-439 present virtually the same issues, the Court will dispose of them simultaneously.[12]

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8 Civil Action No. 77-480, Docket Item 1. In this opinion the Secretary and HEW will be used interchangeably.

9 Id., Docket Items 6 and 10.

10 Id., Docket Item 13.

11 Id., Docket Item 23.

12 Unless otherwise noted, all references hereafter to parties and pleadings will be in terms of Civil Action No. 77-439. Since the amount in controversy in each of these actions exceeds $10,000, the Court has subject matter jurisdiction over both of them under 28 U.S.C. § 1331.

I. BACKGROUND

A. The Statutory Scheme

This is the second time the opponents of Plan Omega have asked this Court to invalidate its section 1122 approval. In NAACP v. Wilmington Medical Center, Inc.,[13] a different group of plaintiffs asserted that the approval was invalid because the Secretary had failed to prepare an environmental impact statement in conjunction with it as purportedly required by the National Environmental Policy Act of 1969 ("NEPA").[14] This Court rejected the plaintiffs' argument, holding that the Secretary reasonably had concluded that section 1122 approval did not constitute "major Federal action" within the meaning of NEPA. The Third Circuit Court of Appeals recently affirmed that decision.[15] In deciding the NEPA issue, both this Court and the Third Circuit reviewed the provisions of section 1122[16] and several of those

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13 436 F.Supp. 1194 (D.Del. 1977).
14 42 U.S.C. §4332(2)(C).
15 NAACP v. Medical Center, Inc., — F.2d — , No. 77-2369 (C.A.3, August 18, 1978).
16 See NAACP v. Wilmington Medical Center, Inc., 436 F.Supp. 1194, 1198-99 (D.Del. 1977) and — F.2d — (C.A.3, August 18, 1978) (slip op. at 12-15).

provisions will be explored again in detail in the course of this opinion. Accordingly, only a brief overview of section 1122 and its implementing regulations will be provided at this juncture.

The express purpose of section 1122 is two-fold: (1) to assure that Federal funds for medicare, medicaid and maternal and child health programs "are not used to support unnecessary capital expenditures" for health care and (2) to "support planning activities with respect to health services and facilities in the various States." 42 U.S.C. § 1320a-1(a).

Under the statute the States retain primary responsibility for developing comprehensive local health planning programs for assessing the need for proposed capital expenditures. State participation is voluntary, however. Interested States must enter into agreements with the Secretary of HEW, which designate a State planning agency ("DPA") to carry out the State's responsibilities under section 1122. 42 U.S.C. §1320a-1(b).[17]

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17 The Federal Government is authorized to pay the costs incurred by the designated planning agency ("DPA") in performing its duties under the statute. 42 U.S.C. § 1320a-1(c).

On March 15, 1974, Delaware made such an agreement with the Secretary, designating the Bureau of Comprehensive Health Planning ("BCHP") of the Delaware Department of Health and Social Services[18] as its DPA.

The designated planning agency is charged with reviewing proposed capital expenditures to determine whether they are consistent with the standards or plans developed to meet the need for adequate health care facilities in the area of the State affected. 42 U.S.C. § 1320a-1(b). The DPA must consult with local health planning agencies interested in a particular proposal and submit to the Secretary the findings of those agencies with respect ot the proposed expenditure together with the DPA's own findings and recommendations and any supporting materials deemed necessary by the

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18 Docket Item 1, pars. 12 and 18. Defendant Amos M. Burke is the Director of Bureau of Health Planning and Resources Development, the successor agency to BCHP. Id. par. 12. At all times relevant to the instant litigation, Burke was the Director of the DPA for Delaware. Id. pars. 34 and 35.

Secretary. Id. The statute also requires the DPA to establish procedures for affording proponents of a capital expenditure found to be unnecessary "an opportunity for a fair hearing." 42 U.S.C. § 1320a-1 (b)(3).

The function of the Secretary when a designated State planning agency has approved a proposed capital expenditure is severely limited. As this Court stated in NAACP v. Wilmington Medical Center, Inc., supra, 436 F. Supp. at 1198:

> If [a section 1122] application has received complete approval when it reaches the Secretary, he then performs the ministerial act of assuring that the proper procedure has been followed. The Secretary, however, has no discretion as to whether the proposed expenditures are unwise. (Footnotes omitted).[19]

The statute does not authorize the Secretary to withhold Federal reimbursement

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19 The Third Circuit agreed with this holding and quoted it with approval in affirming the NEPA decision. NAACP v. Medical Center, Inc., supra, — F.2d at — (slip op. at 15).

for depreciation, interest on borrowed funds or other expenses related to a proposed capital expenditure that has received DPA approval, unless the Secretary determines that neither the DPA nor a local health planning agency had notice of the proposal at least sixty days before an obligation for it had been incurred. 42 U.S.C. § 1320a-1(d)(1)(A).

The Secretary has broader discretion with respect to expenditures found by the DPA to be inconsistent with the State or local health care facility needs or plans, and he may in certain special circumstances override the State's recommendation.[20] It is necessary to consider the scope of that discretion in this case, however, because Plan Omega was approved by the planning groups concerned.

Finally, section 1122 provides that any person dissatisfied with a determination of the Secretary may request reconsideration within six months of such determination. The statute expressly precludes any other administrative or judicial review. 42 U.S.C. § 1122(f).

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20 See 42 U.S.C. § 1320a-1(d)(2).

Against this background, the Court turns to the facts related to WMC's acquisition of section 1122 approval for Plan Omega.

B. Facts

For the most part, the facts in this litigation are undisputed. WMC submitted an application for section 1122 approval of Plan Omega to the Bureau of Comprehensive Health Planning ("BCHP"), the DPA for Delaware, on March 19, 1976.[21] A supplement to the application was filed on April 2, 1976, indicating an increase from 625,000 to 650,000 in the square footage of the proposed Southwest Division due to a decision to provide more private rooms and fewer semi-private rooms.[22] Immediately thereafter, the BCHP began its substantive review, utilizing the services of a statewide agency, the Interim State Comprehensive Health Planning Council ("Interim

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21 Docket Item 9, par. 23; Docket Item 22B, ex. F.
22 Id.

Council"),[23] and a local agency, the Health Planning Council, Inc. ("HPC").[24] Both these agencies reviewed Plan Omega for consistency with applicable standards, criteria and plans, and the Interim Council held public hearings on May 3, 4 and 5, 1976.[25] On June 3, 1976, the HPC "comment[ed] favorably" on Plan Omega as it had been submitted.[26] On June 9, 1976, WMC sent a letter to defendant Burke, indicating that the increase in square footage noted in the April 2 supplement would be slightly

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23 Id. par. 13. Defendant Robert H. Sweeney was chairman of the Interim Council at all times relevant to this litigation. Id.

24 Id. pars. 18 and 28. Defendant Delaware Health Council, Inc. is the successor of the HPC. Id. par. 14.

25 Docket Item 21 (Affidavit of Amos M. Burke).

26 The HPC limited its approval to "Plan Omega, as submitted in the [section] 1122 application dated March 19, 1976, providing the total construction project cost does not exceed $73.5 million, plus or minus 5 percent...." Docket Item 9, par. 28.

higher than estimated[27] and that the construction costs of the Southwest facility would be $2.3 million more than the figure given in the March 19 application. Nevertheless, WMC claimed in the letter that the total project cost would remain unchanged because of factors relating to the financing of the project.[28] On June 15, 1976, the Interim Council voted to approve Plan Omega and defendant Burke, acting on behalf of the BCHP, accepted the Council's recommendation and made a finding that the proposal was in conformity with the applicable standards, criteria and plans. The following day Burke executed HEW's form HRA-45, recording the DPA's finding and recommending that federal reimbursement not be withheld.[29]

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27 The June 9 letter estimated the square footage of the Southwest Division to be 659,000 instead of 650,000. Docket Item 22b, ex. F.

28 Id. Plaintiffs dispute this claim.

29 Docket Item 9, pars. 33 and 34; Docket Item 18, p. 8. Defendant Burke also sent a letter to WMC on June 16, 1976 notifying it that Plan Omega had been approved. Id.

In July, 1976, plaintiffs W.U.N. and Joseph G. DiPinto asked defendant Burke to permit them to contest the approval of Plan Omega at a "fair hearing" but he refused.[30] On August 6, 1976, defendant HEW, by the Acting Regional Health Administrator of Region III, approved Plan Omega for section 1122 purposes.[31]

On September 10, 1976, several organizations and individuals representing the poor, the elderly, the handicapped and various racial and ethnic minorities in Wilmington filed an action in this Court challenging Plan Omega under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.[32]

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30 Docket Item 9, par. 36.
31 Id. par. 37.
32 NAACP, et al. v. Wilmington Medical Center, Inc., et al, Civil Action No. 76-298 (D.Del.). Although all the claims in Civil Action No. 76-298 have either been disposed of by way of summary judgment or withdrawn, several issues are still on appeal to the Third Circuit and the mere pendency of the action has served as a de facto injunction against WMC's proceeding with Plan Omega.

During the course of that litigation, the Court ordered HEW to investigate the claims that Plan Omega would violate those two statutes.[33] HEW's Office of Civil Rights ("OCR") conducted the investigation and in July 1977 announced its conclusion that "implementation of Plan Omega, as presently conceived, would violate Title VI and Section 504." The report further indicated that if WMC would agree to several substantial changes in the plan compliance could be achieved. Several months of negotiations ensued and on November 1, 1977 the Secretary entered into a Contract of Assurances with WMC in which WMC undertook, inter alia, to provide a transportation system for patients, visitors and employees between the remaining hospital in Wilmington and the Southwest Division; to institute a patient allocation system as to services available at both locations to preclude the development of racially

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33 NAACP v. Wilmington Medical Center, Inc., 426 F.Supp. 919, 925 (D.Del. 1977).

differentiated utilization patterns; and to alter construction plans for both facilities to comply with the requirements of Section 504.[34]

Shortly after the Court ordered HEW to conduct its Title VI and Section 504 review of Plan Omega, plaintiffs in the case sub judice exercised their statutory prerogative[35] to request the Secretary to reconsider his August 6, 1976 determination to approve the project under section 1122. Eight months later, on September 7, 1977, Harold Margulies, M.D., Acting Administrator of the Health Resources Administration of HEW, notified plaintiffs that upon reconsideration HEW had decided to affirm its August 6, 1976

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34 Docket Item 9, par. 46.
35 Section 1122(f) of the Act, 42 U.S.C. § 1320a-1(f). The request for reconsideration was filed on February 4, 1977 and supplemented on May 24, July 10, and August 30, 1977. Docket Item 9, par. 41.

decision approving Plan Omega.[36] The decision on reconsideration, however, contained the following qualification:[37]

> [C]ompliance with the July 5, 1977, findings of the Office for Civil Rights, Region III will alter the capital expenditures proposed [by WMC] sufficiently to require a new capital expenditure review under section 1122 of the Social Security Act.

This statement implied that if WMC agreed to make the modifications required to comply with Title VI and Section 504, it would have to submit the modified Plan Omega in its entirety to the BCHP for another section 1122 review.

However, on October 12, 1977, Dr. Margulies disavowed that interpretation in a letter to plaintiffs'

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36 Docket Item 9, par. 44. Dr. Margulies enclosed a seven page document entitled "Reconsideration of the Determination of the Acting Regional Health Administrator, Region III, of the Section 1122 Application of the Wilmington Medical Center, Inc., Wilmington, Delaware" in which he set forth the reasons for his decision to affirm the August 6, 1976 determination. Docket Item 22D, ex. F.

37 Docket Item 22D, ex. F., p. 7.

counsel, stating: "To the extent that the Reconsideration may be so interpreted, it is inconsistent with the section 1122 program regulations."[38] Dr. Margulies expressed HEW's view that if changes were made in Plan Omega to satisfy OCR, those changes would be subject to section 1122 review only to the extent that any one or more of them amounted to a "capital expenditure" as defined by the regulations[39] and were deemed by

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38 Docket Item 22D, ex. H.

39 The regulations define a "capital expenditure" as:

> an expenditure...which, under generally accepted accounting principles, is not properly chargeable as an expense of operation and maintenance and which (i) exceeds $100,000, or (ii) changes the bed capacity of the facility with respect to which such expenditure is made, or (iii) substantially changes the services of th[at] facility....

42 C.F.R. § 100.103(a)(1).

the DPA to warrant review.[40]

WMC executed a Contract of Assurances with HEW's Office of Civil Rights on November 1, 1977. To date, none of the changes to Plan Omega specified therein have been submitted to the BCHP's successor agency for review.

Plaintiffs have asserted at least fifteen separate claims in this action challenging decisions made and procedures used at virtually every step in the administrative process just described. All but two of those claims relate to alleged violations of section 1122, the regulations implementing it, or the agreement entered into by Delaware and HEW pursuant to the statute. The other two claims pertain to alleged violations of plaintiffs' constitutional right to

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40 Under the regulations, the DPA determines in the first instance whether a proposed expenditure is a capital expenditure within the meaning of section 1122. 42 C.F.R. § 100.103(d). Moreover, in the content of a change in an approved capital expenditure, the DPA has discretion to exempt from review changes involving only cost. Id. § 100.103(a)(2)(v).

equal protection. Because defendants have asserted threshhold defenses relating to standing or reviewability with respect to all the statutory or non-constitutional claims, the Court will discuss those claims first.

II. THE STATUTORY CLAIMS

Plaintiffs claim that each of the defendants violated one or more of his duties under section 1122, the regulations, or the agreement between HEW and Delaware in connection with the review and ultimate approval of Plan Omega. Before addressing those claims, the Court notes that defendant WMC challenges the standing of the plaintiffs to assert the alleged violations. Specifically, WMC argues none of the plaintiffs has shown that he meets the following three requirements for standing: (1) the plaintiff must have been injured in fact by the

challenged action;[41] (2) there must be a substantial probability that the requested relief will alleviate the

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41 Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151-52 (1960). In this regard the First Amended Complaint (Docket Item 9) was clearly deficient; except for an allegation that Alice Wilson suffered injury in her capacity as a member of the Delaware Health Council, Inc., the complaint contained no allegations of injury to any of the plaintiffs. See Docket Item 9, pars. 3-10. In order to rectify the situation, plaintiffs have moved to amend paragraphs 3 through 10 of the First Amended Complaint to allege that each of them has been injured by the actions of the defendants challenged in the complaint. Docket Item 32. Defendant WMC stated in its brief that it would oppose the proposed amendment but it has never advanced any reason for its objection. Docket Item 41, p. 10. Because the Court perceives no prejudice to the parties likely to result from the amendment, the motion to amend will be granted.

injury complained of;[42] and (3) the interests allegedly infringed must be "arguably within the zone of interests to be protected" by section 1122.[43] The parties briefed and vigorously

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42 Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976); accord, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 260-61 (1977). It appears there are disputed issues of material fact with respect to whether the relief sought here—rescission of the section 1122 approval of Plan Omega and institution of a more rigorous review process—would deter WMC from building Plan Omega and thus alleviate the alleged injury to plaintiffs. See Affidavits of James P. Tyler, Docket Items 42 and 61; Affidavit of Jerome Pollack, Docket Item 57A. Consequently, even if it were necessary to decide this issue, which it is not, summary judgment would not be appropriate.

43 See Warth v. Seldin, 422 U.S. 490, 498-500 (1975); Sierra Club v. Morton, 405 U.S. 727, 733 (1972). Unlike the first two requirements, which derive from Article III of the Constitution, the zone of interest requirement is a prudential limitation imposed by the Supreme Court. Warth v. Seldin, supra, 422 U.S. at 499-500.

contested the standing question. In light of the Court's conclusions on the merits of the plaintiffs' claims, however, it is unnecessary to decide whether any of the standing requirements have been met. Thus, for purposes of the pending motions the Court will assume standing.

A. Claims Against HEW

At the risk of oversimplifying, plaintiffs have asked this Court to review substantive and procedural decisions made by HEW and the State defendants during the course of the section 1122 process with respect to three general areas: (1) the original approval of Plan Omega and the affirmance of that decision upon reconsideration; (2) the impact for section 1122 purposes of the modifications to Plan Omega made to achieve compliance with the civil rights laws; and (3) the sufficiency of the Gilbane Contract to meet the obligation requirement of the regulations. Defendants contend that section 1122(f), 42 U.S.C. § 1320a-1(f) precludes review of any of the decisions

challenged on nonconstitutional claims.[44] Section 1122(f) provides:

> (f) Any person dissatisfied with a determination by the Secretary under this section may within six months following notification request the Secretary to reconsider such determination. A determination by the Secretary under this section shall not be subject to administrative or judicial review. (Emphasis supplied).

Although the language emphasized appears in clear and unequivocable terms to bar review by this Court of

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44 None of the defendants have argued that section 1122(f), which bars judicial review of a "determination by the Secretary under [section 1122]," precludes review of plaintiffs' constitutional claims. Moreover, the Supreme Court has construed similar statutory language as not precluding judicial review of decisions relating to the constitutionality of the underlying statute. Johnson v. Robison, 415 U.S. 361, 366-74 (1974); see Califano v. Sanders, 430 U.S. 99, 109 (1977).

any determination made by the Secretary under section 1122, plaintiffs contend that the preclusion of review extends only to substantive determinations by the Secretary and not to procedural determinations. Thus, for example, plaintiffs seek to avoid the bar of section 1122(f) by challenging the Secretary's refusal to make an independent determination regarding the consistency of Plan Omega with applicable standards and plans, rather than the approval itself. In evaluating plaintiffs' argument, the Court must look to the legislative history and the purpose of section 1122.

The Administrative Procedures Act ("APA"), 5 U.S.C. § 701(a), authorizes judicial review of agency action except where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The Supreme Court has held that:

> "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." A clear command of the statute will preclude review; and such a command may be inferred from its purpose .... It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review.

Barlow v. Collins, 397 U.S. 159, 166-67 (1970)(citations omitted)(emphasis supplied)(quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967)).

The issue here is whether Congress intended to preclude review of all determinations by the Secretary under section 1122 or only substantive determinations, such as whether the proponent of an approved capital expenditure had notified the DPA about it at least sixty days before incurring an obligation. "[E]ach case raising an administrative reviewability question must be analyzed on the basis of the specific statutory provisions involved."

Briscoe v. Bell, 432 U.S. 404, 414 (1977). The language of section 1122(f) is uncomplicated and on its face exempts from review any "determination by the Secretary under [section 1122]." Nothing in the legislative history suggests that Congress meant to preclude review of "substantive" determinations only or to limit the reach of section 1122(f) in any other way. The House Ways and Means Committee, for example, simply paraphrased section 1122(f) in its section-by-section analysis of the bill that became the Social Security Amendments of 1972.[45] The only evidence

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45 The Committee Report stated:

> Subsection (f) of the new section 1122 provides that any person dissatisfied with a determination under the section may request reconsideration by the Secretary up to 6 months after notification, with such determinations not being subject to other administrative or judicial review.

H.R.Rep.No. 231, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Admin. News 5290.

of legislative intent offered by plaintiffs to support their construction of the statute is a statement made by former Secretary of HEW, Elliot Richardson, at a hearing before the Senate Finance Committee in 1970.[46] A single statement by an executive official made at a hearing two years before the enactment of section 1122(f)

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46 In response to a question from Senator Talmadge about the effect of a preclusion-of-review provision nearly identical to section 1122(f), former Secretary Richardson replied:

> [T]here is always an opportunity of going to a Federal court to seek to maintain the proposition that the Secretary has acted arbitrarily or beyond his authority. What this means, in effect, is that there is no judicial review strictly on the administrative basis of determinations made within the scope of the Secretary's discretion.

Proposed Amendments to the Social Security Act: Hearings on H.R. 17559 Before the Senate Comm. on Finance, 91st Cong., 2d Sess. 76 (1970).

does not provide a sufficient basis for ignoring the plain language of the statute and inferring a Congressional intent to preclude review of substantive determinations only.

The Supreme Court's recent decision in Briscoe v. Bell, 432 U.S. 404 (1977), strongly supports the Court's conclusion that section 1122(f) absolutely bars judicial review of procedural as well as substantive determinations by the Secretary. In the Briscoe case, the Governor of Texas challenged actions by the Attorney General of the United States and the Director of the Census that led to a determination that Texas was subject to the 1975 Amendments to the Voting Rights Act. Under section 4 (b) of the Act,[47] the Attorney General and the Director were responsible for determining whether specified preconditions for application of the Act to a particular jurisdiction were met.

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47 42 U.S.C. § 1973b(b).

The Governor sought a declaratory judgment determining " 'how and under what circumstances the determinations ... should be made.' " Briscoe v. Bell, supra, 432 U.S. at 407. He argued, inter alia, that the Attorney General failed to consider a required factor in making his determination and that the Director of the Census misinterpreted a clause of the statute.[48]

The Supreme Court was called upon to construe the following provision of section 4(b): "A determination of the Attorney General or the Director of the Census under this section ... shall not be reviewable in any court...."

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48 432 U.S. at 407 n. 6. The Governor also argued that the Attorney General and the Director violated their statutory duties by failing to afford Texas a pre-determination hearing and by making an incorrect calculation with respect to applicability. Id.

Id. at 408. For all practical purposes, the language is identical to that in section 1122(f). The District Court and the Court of Appeals construed the preclusion-of-review provision narrowly and found that they had jurisdiction to consider the "pure legal question" whether the officials had correctly interpreted the statute or had acted in a fashion "plainly in excess of [their] statutory authority." Id. Both courts then considered and rejected on their merits the Governor's procedural and statutory construction arguments. Id. at 409. The Supreme Court, however, found the intent of Congress to preclude judicial review unmistakable and ordered dismissal of the complaint without reaching the merits, holding that "the courts below erred in finding that they had jurisdiction to review petitioners' claim of erroneous application of §4(b)." Id. at 415.

Plaintiffs contend Briscoe v. Bell is distinguishable because it involved challenges to determinations

by the Attorney General and the Director, while the instant case involves an attack on the Secretary's "failure to make any determinations or findings at all."[49] The Court disagrees. Plaintiffs' argument that the Secretary had a statutory duty to make an independent review of Plan Omega before approving it was presented to the Secretary in the February 4, 1977 Request for Reconsideration.[50] The Secretary rejected the argument on the ground that section 1122 did not authorize him to make an independent judgment of the consistency of a DPA-approved capital expenditure with applicable standards, criteria and plans.[51]

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49 Docket Item 30, pp. 19-20.
50 Docket Item 22B, p. 2.
51 Docket Item 22D, ex. F. Even if the Court were to reach the merits of the claims that the Secretary violated his duties under section 1122 by failing to conduct an independent review of Plan Omega either before approving it or, at least, upon reconsideration, the Secretary would be entitled to summary judgment. For, as previously stated, the Secretary's duties under section 1122 are severely limited when the state agency has approved a proposed

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Thus, plaintiffs' claims are indistinguishable from the statutory interpretation claims held nonreviewable in Briscoe v. Bell, supra. And borrowing the language of Justice Marshall's conclusion in Briscoe, this Court concludes:

> [Section 1122(f)] could hardly prohibit judicial review in more explicit terms.... The language is absolute on its face and would appear to admit of no exceptions. The purposes and legislative history of [section 1122] strongly support this straightforward interpretation.

432 U.S. at 409-10.

The Court also considers Thermtron Products, Inc. v. Hermandorfer, 423 U.S. 336 (1976), a case cited by plaintiffs, inapplicable in the circumstances of this case. The Thermtron case involved 28 U.S.C. § 1447(d), which precludes review of a Federal court order remanding a case removed from a State

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capital expenditure and he has no discretion to overturn an approval by the DPA. NAACP v. Wilmington Medical Center, Inc., supra, 436 F.Supp. at 1198.

court back to the court from which it had been removed. The Supreme Court held that Congress did not intend to extend the prohibition against review beyond orders entered pursuant to 28 U.S.C. § 1447(c). Id. at 346. Therefore, the Court permitted review of an order based "on grounds wholly different from those upon which §1447(c) permits remand." Id. at 344; see Briscoe v. Bell, supra, 432 U.S. at 414 n. 13. None of the actions or omissions alleged by the plaintiffs in the case sub judice are so clearly outside the Secretary's statutory authority as to require consideration of the applicability of the Thermtron decision here.

Turning to the specific claims asserted against HEW, the Court concludes that section 1122(f) precludes review of each of them. The first claim, that the Secretary had a duty to make an independent finding, has already been discussed. Plaintiffs also contend that the Secretary's October 12, 1977 determination that

Plan Omega, as modified to comply with the civil rights laws, would not have to be reviewed again in its entirety under section 1122 violated the statute. As the October 12 letter to plaintiffs' counsel illustrates, however, the Secretary based his decision on his interpretation of the statute and the regulations implementing it.[52] The fact that HEW apparently had reached a contrary conclusion only a month earlier, or that the interpretation may be erroneous as a matter of law, or that the Secretary's decision may have been influenced by a letter from a business leader and personal friend

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52 Docket Item 22D, ex. H. While the Secretary's interpretation of the applicable statutory and regulatory provisions may not be the only possible interpretation, it is clearly not an unreasonable one.

of the President[53] is irrelevant, because in any of those events section 1122(f) would still preclude judicial review. See Briscoe v. Bell, supra, 432 U.S. at 409-15.

Plaintiffs asserted no other statutory claims directly against HEW, but several of the claims against defendants Burke and WMC challenge actions that were either upheld by HEW upon reconsideration or taken by HEW in the first instance. Consequently, those claims raise additional issues of reviewability.

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53 Plaintiffs have alleged and vigorously argued that the Secretary reversed his decision regarding the effect of modifying Plan Omega to comply with the civil rights lawa as a result of a letter he received on September 30, 1977, from Irving Shapiro, Chairman of the Board of the DuPont Company and allegedly a friend of the President. Docket Item 9, pars. 42 and 43. Even if this allegation were true and the Secretary did consider Mr. Shapiro's letter, he still would have been acting within his authority under section 1122 and therefore this Court would lack jurisdiction to review his determination under section 1122(f).

B. Claims Against State Defendants

Plaintiffs' claims against the State defendants may be subdivided into two groups: substantive claims and procedural claims. The substantive claims charge that defendant Burke as Director of the DPA, defendant Sweeney as Chairman of the Interim Council, and defendant Delaware Health Council, Inc. as successor to the HPC, the local health planning agency involved, respectively, "acted in an arbitrary and capricious manner and in violation of § 1122" in approving Plan Omega because it "was in fact ... inconsistent with applicable standards, criteria, and plans."[54]

At the outset, the Court notes that the decisions of the Interim Council and the HPC to recommend approval of Plan Omega are not final

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54 Docket Item 9, pars. 54, 60 and 61. No other claims have been asserted against defendants Sweeney and Delaware Health Council, Inc.

actions subject to judicial review, because they were only interim steps in the administrative process. The Supreme Court has stated:[55]

> [T]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action. ICC v. Atlantic Coastline R. Co., 383 U.S. 576, 602 (1966); Rochester Telephone Corp. v. United States, 307 U.S. 125, 143 (1939).

Because the BCHP had full discretion to accept or reject the findings and recommendations of the Interim Council and the HPC,[56] those findings clearly were "advisory opinions" and did not

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55 Port of Boston Marine Terminal Ass'n v. Rederiakliebolaget Transatlantic, 400 U.S. 62, 71 (1970).

56 See 42 U.S.C. § 1320a-1(b), (d); 42 C.F.R. §§ 100.104(a)(2)(i), (d); Docket Item 22E, Agreement, par. II.A(d).

determine any "right or obligation," so that "legal consequences" would flow therefrom. Thus, the Court holds that decisions by statewide and local health planning agencies assisting the DPA are not final decisions subject to judicial review. Accordingly, summary judgment will be entered against plaintiffs on their claim against Interim Council Chairman Sweeney and the Court also will enter judgment in favor of defendant Delaware Health Council, Inc. and against plaintiffs based on the law of the case.

With respect to the substantive claim against defendant Burke, the Court will assume arguendo that the DPA's approval of Plan Omega constituted final action for administrative review purposes. Before embarking on a review of the DPA's determination that the proposal was consistent with applicable standards and plans, however, the Court must decide whether Congress intended to preclude the Federal courts from reviewing actions by the

DPA.[57] The initial inquiry is whether judicial review has been expressly precluded by statute--section 1122(f) in this case. Plaintiffs contend that section 1122(f) is inapplicable because it only precludes judicial review of "determination[s] by the Secretary." Since a decision of the DPA to approve a proposed capital expenditure is binding on the Secretary, the Court

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57 The issue is phrased in terms of "prohibition" rather than "authorization" of judicial review because the Supreme Court has held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). In the circumstances of this case, the presumption of reviewability may not be applicable. Unlike the situation under the APA and the cases in which the Supreme Court has recognized the presumption, the instant case involves an attempt to obtain review of action by a State, rather than a Federal, agency. Compare id. and cases cited therein; 5 U.S.C. § 701(b)(1). In view of the clear legislative purpose to preclude review, however, the Court need not decide the issue.

will assume that such decisions are not preliminary actions to be integrated for review purposes into final determinations by the Secretary and that section 1122(f) does not expressly preclude judicial review of DPA approvals.

Absent express preclusion, non-reviewability may be inferred from a statute's purpose and its legislative history. However, courts should restrict access to judicial review only upon a showing of clear and convincing evidence that Congress so intended. Barlow v. Collins, supra, 397 U.S. at 167.

The legislative purpose behind section 1122 is limited and specific. Congress intended (1) to contain "hospital expenditures by limiting federal reimbursements covering capital expenditures for health care to those expenditures deemed necessary by the state" and (2) to encourage "rational health planning by the states." NAACP v. Medical Center, Inc., — F.2d — (C.A.3, August 18, 1978)(slip op. at 12-13) (emphasis added), aff'g 436 F.Supp.

1194 (D.Del. 1978).[58] The House Ways and Means Committee stated that the statute "would in no way change the autonomy or authority of existing State or local planning agencies."[59] In keeping with the purpose of section 1122 to support State and local health planning efforts, Congress left the primary responsibility for evaluating the merits of a proposed capital expenditure with the State agencies. Once the DPA approves a proposal, the Secretary's role is purely ministerial; he has no discretion to determine whether the proposed expenditure is unwise. The limited role of the Secretary under section 1122 clearly evinces Congress' intent to avoid Federal[60] interference

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58 See 42 U.S.C. § 1320a-1(a).
59 H.R. Rep. No. 231, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Admin. News 5066.
60 The regulations and the agreement between HEW and Delaware pursuant to section 1122 recognize that judicial review may be available under State law or regulation to a proponent of an expenditure disapproved by the DPA. 42 C.F.R. § 100.106(c)(4); Docket Item 22E, Agreement, par. II.B3(d). Although

(continued next page)

with substantive planning decisions made on the State and local level. Given the prohibition on judicial review of the Secretary's decision set forth in section 1122(f), it is inconceivable that Congress could have intended the Federal judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of a proposed capital expenditure. Thus, the Court discerns a clear Congressional intent to preclude judicial review of the BCHP's approval of Plan Omega on June 15, 1976 and will

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plaintiffs contend this fact supports their position, the Court considers it irrelevant. Nothing in the statute, regulations or agreement suggests that the availability of judicial review on the State level at the behest of a dissatisfied opponent of a proposal was ever contemplated. More importantly, judicial review by State courts of substantive decisions by the DPA is totally consistent with the legislative intent to have planning determinations made at the State and local level. Review of such decisions in Federal court, on the other hand, would directly contravene the purpose of section 1122.

enter summary judgment in favor of defendant Burke on plaintiffs' claim that he acted in an arbitrary and capricious manner in approving the plan.

In addition to the substantive claims, plaintiffs charge that defendant Burke violated the requirements of section 1122, its implementing regulations, and Delaware's agreement with HEW in the following ways: (1) by failing to make an independent finding on behalf of Delaware's DPA, the BCHP, that Plan Omega was consistent with applicable standards and plans; (2) by failing to determine whether the modifications noted in the June 9, 1976 letter from WMC constituted a new capital expenditure subject to section 1122 review; (3) by failing to send HEW "copies of all comments from all parties participating in the review process at both local and State levels" when he notified the Secretary of the BCHP's approval of Plan Omega; and (4) by failing to require that Plan Omega as modified to comply with the findings of HEW's Office of Civil Rights undergo a new

section 1122 review.[61] The first of these "procedural" claims were submitted to HEW in connection with the Request for Reconsideration.[62] Because HEW considered and rejected both of those contentions in its September 7, 1977 Decision upon Reconsideration,[63] the Court concludes that it lacks jurisdiction to review either of them. This conclusion is based on the express preclusion of review contained in section 1122(f).

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61 Docket Item 9, pars. 53, 56, 57 and 58.
62 Docket Item 22B, pp. 5-6.
63 Docket Item 22E, ex. F., pp. 3-5. The Secretary found that the DPA had made the required findings and recommendation regarding Plan Omega. Id. pp. 3-4. As to the changes noted in the June 9, 1976 letter, the Secretary found that they did not necessitate additional review because the letter also indicated that the changes would not cause an increase in the total amount of the proposed capital expenditure submitted on March 19, 1976. Id. pp. 4-5.

Likewise, plaintiffs cannot prevail on their claim that defendant Burke breached the agreement between Delaware and HEW under section 1122 by failing to submit copies of the comments and reports of the Interim Council and HPC to HEW along with the findings of those agencies and the DPA. Given the ministerial role of the Secretary with respect to proposed capital expenditures that have received DPA approval, submission of the reports of the subordinate State and local health planning agencies would be a useless act and a needless burden on both the DPA and HEW. While it is arguable, and the Court has assumed, that plaintiffs have suffered injury in fact as a result of the approval of Plan Omega under section 1122, there is no evidence that any of the plaintiffs was injured by defendant Burke's failure to send the comments and reports of the Interim Council and HPC to HEW. Because most if not all of those reports were in fact submitted to HEW in connection with the Request for Reconsideration[64] and the Secretary

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64 See Docket Items 22B and 22C and exhibits attached thereto.

still affirmed the approval of Plan Omega, it is obvious that plaintiffs have not been injured by the challenged action. Accordingly, the Court finds that the plaintiffs lack standing to assert their third procedural claim against defendant Burke. See Association of Data Processing Service Organizations, Inc. v. Camp. 397 U.S. 150, 151-52 (1960).[65]

The final claim, which concerns the DPA's failure to require the entire Plan Omega as modified to undergo a

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65 The claim based on defendant Burke's failure to transmit certain reports is based solely on the agreement between Delaware and HEW under section 1122; neither the statute nor the regulations require the DPA to submit such reports. The Secretary, therefore, clearly had the authority to waive complaince with the alleged reporting requirement. It is clear from section 1122(f), and the general purpose of the statute that Congress did not intend the courts to become involved in the day-to-day procedures employed by HEW in administering section 1122. Consequently, even if plaintiffs had standing, the Court seriously doubts that it would have jurisdiction to entertain a claim based on an alleged technical breach of the agreement between Delaware and HEW.

(continued on next page)

new section 1122 review, is closely related to another claim asserted against WMC. The two claims are discussed together in the next section of this opinion.

C. Claims Against WMC

Plaintiffs have asserted three claims against defendant WMC, but only two warrant serious discussion.[66] They both pertain to the requirement in the regulations (42 C.F.R. §100.109(a)) that the proponent of an approved capital expenditure incur an obligation for it within, at most, eighteen months of the date it was approved by the

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In view of its conclusion regarding standing, however, the Court need not reach this issue.

66 The Court finds no merit in the claim that WMC violated the requirements of section 1122 by submitting to the BCHP a preliminary financial report which it knew or should have known "was based on grossly unrealistic and untrustworthy assumptions as to projected revenues and costs." Docket Item 9, par. 62. The financial report submitted with the application for review

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DPA.[67] The BCHP approved Plan Omega on June 15, 1976. Under the regulations,

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of Plan Omega included the caveat that it was a "preliminary report" and "should not be used to assist in obtaining financing for the project." Docket Item 22B, ex. F. The assumptions upon which the projected financial statements were based were clearly identified. Id. Thus, the BCHP and other reviewing agencies had notice that the financial projections were only preliminary and chose to accept them anyway. There is no allegation that WMC deliberately withheld information available to it or that it failed to provide information requested by the DPA.

67 The regulation provides in pertinent part:

> [W]here the designated planning agency has found that a proposed capital expenditure is in conformity with the standards, criteria, and plans described in § 100.104 (a)(2), the obligation for such capital expenditure shall be incurred not more than one year following the date of such finding, or such shorter period as may be required by applicable State law: Provided, That in the absence of any State law to the contrary, the designated planning agency may, pursuant to a showing of good cause by the person proposing such expenditure, extent the period during

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WMC had one year from that date to incur an obligation for Plan Omega or suffer termination of the DPA approval. For good cause shown, however, the DPA was authorized to extent the period for incurring an obligation for up to an additional six months. WMC obtained a six-month extension from the BCHP in June 1977, giving it until December 15, 1977 to incur an obligation. On December 14, 1975, WMC entered into a contract with the Gilbane Building Company ("Gilbane Contract") for the construction of Plan Omega as modified to comply with the civil rights laws.

Plaintiffs assert two claims against WMC with respect ot the Gilbane Contract. First, they contend that the Contract authorizes costs which are open-ended and far in excess of the

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> which such obligation must be incurred for up to an additional six months. If no such obligation is incurred within such period, the designated planning agency's approval shall, for purposes of this subpart, be deemed to be terminated upon the expiration of such period.

42 C.F.R. § 100.109(a).

costs approved by the DPA.[68] Second, plaintiffs argue that the Gilbane Contract does not satisfy the requirements of the regulations with respect to incurring an obligation for a capital expenditure and, therefore, that the BCHP's approval of Plan Omega has terminated.[69]

The former contention and the claim that defendant Burke had a duty to order Plan Omega as modified to undergo another section 1122 review raise questions concerning the procedure for handling changes to proposed capital expenditures made after approval has been obtained. Section 1122(g) defines a "capital expenditure" for purposes of the statute as "an expenditure which...is not properly chargeable as an expense of operation and maintenance and which (1) exceeds $100,000, (2) changes the bed capacity of the [affected] facility..., or (3) substantially changes the services of the [affected] facility." 42 U.S.C. § 1320a-1(g);

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68 Docket Item 9, par. 63
69 Id. par. 64.

see 42 C.F.R. §100.103(a)(1). The statute does not address the effect of changes in an approved capital expenditure, but the regulations do deal with the problem. The regulations provide that:

> Any change in a proposed capital expenditure which itself meets the criteria set forth in this paragraph, shall, for purposes of this subpart, be deemed a capital expenditure; Provided, That an increase or decrease in the cost of a proposed capital expenditure which increase or decrease is not related to a change in bed capacity or a subatantial change in services may, at the option of the planning agency, be exempt from review under this subpart.

42 C.F.R. §100.103(a)(2)(v). Furthermore, a determination by the DPA that a proposed expenditure or a change therein is not a capital expenditure within the meaning of the statute and regulations, or that it should be exempt from review or that it is otherwise not subject to section 1122 review is expressly made binding upon the Secretary by the regulations. Id. §100.103(d). On the other hand, if the DPA determines that a change in a proposed expenditure is

a capital expendure, the proponent may appeal to the Secretary. Id.

The essence of plaintiffs' claim against defendant Burke is that WMC's decision to alter Plan Omega to comply with the findings of the Office of Civil Rights so substantially changed Plan Omega that it gave rise to a duty on Burke's part to require the modified proposal to undergo a complete section 1122 review. Neither the statute nor the regulations explicitly imposes such a duty on the DPA or authorizes the DPA to vacate the approval of a capital expenditure on the basis of subsequent changes in the proposed expenditure. Moreover, in this case, the Secretary has considered the issue and rejected plaintiffs' position. In a letter to plaintiffs' counsel, dated October 12, 1977, Dr. Margulies explained HEW's position as follows:

> Wilmington Medical Center has received approval, for purposes of the section 1122 review program, for Plan Omega. Plan Omega is a specific proposal to construct a new facility of a stated bed capacity to provide stated health

> services, as well as to remove certain services from the Delaware Division and to remodel that facility, at a given cost. To the extent that the capital expenditure actually made by Wilmington Medical Center deviates from Plan Omega in such a way that any of the three criteria set forth above is met, then reimbursement for amounts related to the capital expenditure which was not a part of Plan Omega may be withheld from payments to the facility. This applies equally to any capital expenditure which was not a part of Plan Omega and which results in the termination of a health service. If Wilmington Medical Center should in fact make such a change and not submit notice to the DPA in accordance with the requirement of [42 C.F.R.] §100.106(a)(1), then the Regional Health Administrator, upon ascertainment of such non-compliance, will make a determination that timely notice (for that change) was not given. In that case, reimbursement related to the change in the capital expenditure will be withheld....

Docket Item 22D, ex. H, p. 3. In light of HEW's position, which under section 1122(f) is not subject to judicial review, it is clear that defendant Burke did not violate the statute or its regulations by failing to vacate the approval of Plan Omega in its original form.

For the same reasons, the fact that the costs of construction under the Gilbane Contract may exceed significantly the costs contained in the application for section 1122 approval presented to the DPA and the State and local health planning agencies on March 10, 1976 does not render the original approval of Plan Omega invalid. By incurring an obligation for more than the amount approved, WMC simply exposes itself to the risk that to the extent the capital costs related to Plan Omega exceeded the amount originally approved, those costs will not be reimbursed from Federal funds. Section 1122 imposes no obligations on WMC in this regard; instead, it imposes conditions for obtaining a guarantee that Federal funds will not be withheld on the ground that WMC's capital expenditures were unnecessary or unreasonable. Accordingly, summary judgment will be entered in favor of WMC on plaintiffs' claim that it violated the cost containment policies of section 1122.

Plaintiffs' final statutory claim is that the BCHP's approval of Plan Omega expired on December 15, 1977 due to WMC's faliure to incur an obligation for that capital expenditure within eighteen months of obtaining approval as required by the regulations.[70] Plaintiffs contend that the Gilbane Contract does not constitute an "obligation" within the meaning of section 1122 and its implementing regulations.

The regulations define an "obligation" for a capital expenditure, such as Plan Omega as "an enforceable contract...for the construction, acquisition, lease or financing of a capital asset." 42 C.F.R. §100.103(c)(1). Plaintiffs argue that the Gilbane Contract is not such an obligation because it postpones the commencement of construction to an unspecified future date and gives WMC the discretion not to proceed at all. The argument is based on three clauses of

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70 See 42 C.F.R. §100.109(a) set forth in note 67 supra. Plaintiffs moved for partial summary judgment against WMC on this issue. Docket Item 43.

the Gilbane Contract[71] which condition WMC's obligation to deliver a direction

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71 The clause read as follows:

> 5.2 CM [Construction Manager] shall commence the Work not later than thirty (30) days following the receipt by CM of Owner's written direction therefore. It is acknowledged by CM that (i) litigation pending at the date hereof has suspended the financing of the Project and (ii) Owner has advised CM that it anticipates final resolution of such litigation prior to July 1978. Prior to the receipt of Owner's direction to commence the Work CM shall incur no expenses payable by Owner hereunder.
>
> 5.3 Promptly following the final resolution of the [litigation] and the receipt of the financing referred to in Section 5.2 hereof, Owner shall deliver to CM a written direction to commence work.
>
> 12.2.1 If on July 1, 1978, litigation pending against Owner or otherwise, whether instituted prior or subsequent to the date hereof, and affecting adversely Owner's ability to obtain financing for the Project upon terms and conditions deemed reasonable and prudent by Owner in its sole discretion, shall remain pending or shall have been resolved

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to commence work to Gilbane upon final resolution of the litigation relating to Plan Omega and WMC's receipt of financing. Under these clauses and subject to certain conditions that now appear to have been satisfied, WMC also has the right after July 1, 1978, to terminate the Contract unilaterally upon giving seven days written notice to Gilbane.

According to plaintiffs, the Gilbane Contract is so contingent in nature that it is illusory and unenforceable under general principles of contract law and within the meaning of HEW's regulations. To some extent, the Court shares the plaintiffs' concern that the Contract constitutes mere paper compliance with the regulatory requirements and that it tends to undermine the credibility of the

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> adversely to Owner, or if prior to such date Owner shall have been unable to obtain or obtain commitments for such financing then from and after July 1, 1978, Owner shall have the right to terminate the Contract by the giving of seven days prior written notice to CM.

Docket Item 36A (Civil Action No. 77-480), ex. 3, pp. 13, 28-29.

section 1122 process. However, the Court is not convinced that it has the power to review the Gilbane Contract to determine whether it satisfies the regulatory requirement that an obligation be incurred within eighteen months of receiving DPA approval.

The procedures for section 1122 review established by the regulations in 42 C.F.R. Part 100 do not address the question: who determines whether a particular contract for a capital expenditure constitutes an "obligation" as defined in 42 C.F.R. §100.103(c). Likewise, there is nothing in the agreement or the DPA Manual regarding the issue. Nonetheless, the Court finds that the statutory and regulatory scheme gives rise to a strong inference that the DPA was intended to determine in the first instance whether a contract satisfies the obligation requirement and that at least proponents of a capital expenditure dissatisfied with the DPA's decision would be able to appeal to the Secretary.

In arguing that the Gilbane Contract does not constitute an "obligation," plaintiffs rely on two decisions by the Pennsylvania Department of Health,[72] terminating section 1122 approval for proposed capital expenditures because the construction contracts entered into by the proponent health care providers did not satisfy the obligation requirement of 42 C.F.R. §100.109(a). One decision involved a sixty-bed Medicenter to be built in Oil City, Pennsylvania. The proponent obtained section 1122 approval for the project and in June 1976 (eighteen months later) forwarded a contract requiring, inter alia, commencement of construction within 120 days to the local health planning agency, which accepted it as a binding legal contract. In October 1976, however, the parties to the contract extended the required commencement date by about fifteen months without notifying either the local agency or the DPA. Upon being apprised of the

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72 Docket Item 36A (Civil Action No. 77-480), exs. 4 & 5.

amendment, the DPA made the following determination:

> [T]he October 8 amendment, signed 22 months after approval..., so substantially changed the contract and delayed project completion... that for purposes of Section 1122, the approval of [the] Prject... lapsed on that date.[73]

In the second decision relied upon by plaintiffs,[74] the proponent of a capital expenditure had not given the DPA a contract for construction until several days after the eighteen-month time period had expired. In addition, the contract contained no specific date for commencement of construction and ten months after it was signed construction still had not begun. For these reasons, the Pennsylvania Department of Health decided that section 1122 approval for the capital expenditure had expired.

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73 Docket Item 36A (Civil Action No. 77-480), ex. 4, p. 2.
74 Id., ex. 5 (Memo, dated March 20, 1978, re: Termination of an 1122 Approval for Witt Home for the Aging).

WMC argues that the Gilbane Contract is distinguishable from the contracts involved in the two Pennsylvania decisions, but it is unnecessary to decide that issue. The Court considers the decisions by the Pennsylvania Department of Health relevant to the instant case primarily because they support the conclusion that the DPA is the proper body to determine initially whether the regulatory requirement of an obligation has been met.[75] Nothing in the statute or regulations indicates that this Court is empowered to decide independently or to review decisions by the DPA or HEW as to whether the Gilbane Contract constitutes an "obligation." Thus, in the absence of any evidence to the contrary, the Court concludes that section 1122(f) precludes review of determinations by the Secretary or DPA

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75 It is also noteworthy that in both instances the Pennsylvania Department of Health's determination was forwarded to HEW, suggesting the possibility of review by that agency. Id., exs. 4 and 5.

in this area.[76]

To determine whether HEW had made a determination with respect to the obligation issue, the Court asked its counsel, Mr. Sher, at oral argument whether HEW had interpreted the term "obligation" or ruled on the Gilbane Contract. Mr. Sher responded that "after some considerable review of the matter .... [T]he position of HEW is that if the contract appears to be fair on its face, as [the Gilbane Contract] does, it is sufficient to satisfy the requirement of the regulation."[77]

In light of Mr. Sher's statement and the failure of the Delaware DPA to

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76 Plaintiffs have attempted to circumvent the preclusion-of-review provision by asserting their claim against WMC instead of HEW or the State agencies. The Court will not permit plaintiffs to accomplish indirectly what the statute prevents them from doing directly and therefore holds that section 1122(f) governs this issue.

77 Transcript of Oral Argument ("Tr."), Docket Item 64, p. 108.

object to the Gilbane Contract, the Court finds that the Secretary has made a determination on this issue. Because section 1122(f) expressly precludes judicial review of determinations by the Secretary under section 1122, defendant WMC is entitled to summary judgment on plaintiffs' claim that the section 1122 approval of Plan Omega has expired.

III. THE EQUAL PROTECTION CLAUSE

Lastly, plaintiffs have asserted two constitutional claims. Those claims revolve about section 1122(b)(3), 42 U.S.C. § 1320a-1(b)(3), which provides in relevant part:

> (b) The Secretary...shall make an agreement with any State which is able and willing to do so under which a designated planning agency...will —
>
> * * * *
>
> (3) establish and maintain procedures pursuant to which a person proposing any such capital expenditure may appeal a recommendation by the [DPA] and will be granted an opportunity for a fair hearing....

> whenever and to the extent that the findings of such [DPA]... indicate that any such expenditure is not consistent with the [applicable] standards, criteria, or plans.... (Emphasis supplied).

The statute requires participating states to establish procedures by which the proponents of a capital expenditure may appeal adverse decisions by the DPA,[78] but it does not require the establishment of similar appeal procedures for opponents of proposals that have been approved. The HEW regulations and the BCHP procedures also provide an opportunity for a fair hearing only to unsuccessful proponents of an expenditure.[79]

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78 See section 1122(d)(1)(B)(ii), 42 U.S.C. § 1320a-1(d)(1)(b)(ii); H.R. Rep. No. 231, 92 Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Admin. News 5004.

79 There is a dispute concerning whether the statute actually precludes HEW and the DPA from affording consumer opponents of a proposed expenditure a fair hearing. Defendants contend that it does, while plaintiffs assert that both the Secretary and the DPA have discretion under the statute to provide such hearings. It is unnecessary to resolve that dispute, however, because

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Plaintiffs claim the Secretary's failure to accord opponents of a proposed capital expenditure the same appeal rights as proponents thereof constitutes a violation of their right to equal protection as guaranteed by the Due Process Clause of the Fifth Amendment.[80] Virtually, the same claim has been asserted against defendant Burke, the director of BCHP, under the Equal Protection Clause of the Fourteenth Amendment.[81] Plaintiffs admit

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in either case the Court finds that the classification drawn between proponent health care providers and opponent consumers is not violative of the plaintiffs' right to equal protection.

80 Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976).

81 Although the Amended Complaint appears to base this claim on the Due Process Clause of the Fourteenth Amendment as well as the Equal Protection Clause (Docket Item 9, par. 55), the plaintiffs have adjured any intention of asserting a due process claim against defendant Burke. Tr. at 41, 70-71; Docket Item 30, p. 34 (Plaintiffs' Memorandum of Points and Authorities).

that the classification at issue here does not impinge upon any "fundamental interest" or affect with particularity any "suspect class." Therefore, the test of constitutionality is whether the classification bears a rational relation to a legitimate state interest. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 489 (1977); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976)(per curiam); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)(per curiam). The Supreme Court examined a state classification under the rational basis standard in Massachusetts Board of Retirement v. Murgia, supra, and observed:

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one.... Such action by a legislature is presumed to be valid.

427 U.S. at 314 (footnote omitted).

In this case, the Court finds that the distinction drawn in the statute and the regulations and procedures implementing it between the hearing rights

accorded to proponents and to opponents, like the plaintiffs, of a proposed capital expenditure is rationally related to a legitimate government interest served by section 1122. One purpose of section 1122 is to "aboid the use of Federal funds to support unjustified capital expenditures" by health care providers.[82] Congress sought to accomplish this bojective by authorizing the Secretary to withhold reimbursements under medicare, medicaid, and maternal and child health programs to providers for depreciation, interest and other capital costs related to capital expenditures that are determined to be inconsistent with State or local health facility plans.[83] Absent section 1122, health care providers like WMC would be entitled to reimbursement for their capital costs from Federal funds appropriated under medicare and the other programs mentioned.

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82 H.R. Rep. No. 231, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Admin. News 5065; see 42 U.S.C. § 1320a-1(a).

83 H.R. Rep. No. 231, supra, at 5065-66.

A finding that a proposed capital expenditure is inconsistent with State plans and needs could cause a health care provider to be denied its entitlement to reimbursement from Federal funds. Arguably at least, the affected provider would have a right under the Due Process Clause to a hearing before reimbursements to it were finally terminated.

The interests of health care consumers and others who might oppose a particular capital expenditure are much less tangible and substantial. Indeed, plaintiffs admit their purported right to a hearing stems not from the deprivation of any interest protected by the Due Process clause, but rather from the fact that Congress decided to accord hearing rights to health care providers. Plaintiffs' argument rests on the premise that their interests are indistinguishable from those of providers. Because the Court considers the interests under section 1122 of proponents of a disapproved capital expenditure to be at least arguably worthy of protection under the Due Process Clause while the interests of opponents of approved

proposals do not appear to deserve such protection, plaintiffs' argument must be rejected.

Another basis for the distinction between proponents and opponents of a capital expenditure is the desire evident in both the statute and the implementing regulations to streamline the section 1122 review process and to avoid delaying the construction of needed facilities. This concern explains Congress' decision to preclude judicial review of the Secretary's determinations pursuant to section 1122 and the Secretary's promulgation of a regulation (42 C.F.R. §100.106(a)(4)) requiring the DPA to complete its review of an application within 60 to 90 days of receiving it. If the Secretary fails to rule within the time frame allotted to him, the proposal is deemed approved for section 1122 purposes. Providing proponents of an expenditure disapproved by a DPA with a fair hearing is not inconsistent with this objective, because there has been an initial finding that the proposed expenditure is unnecessary. The same cannot be said

be said with respect to according opponents of a DPA-approved proposal a right to a hearing. Moreover, contrary to plaintiffs' contentions, the statute and regulations protect the interests of consumers in other ways. For example, section 1122(b), 42 U.S.C. § 1320a-1(b), requires that every DPA have "a governing body or advisory board at least half of whose members represent consumer interests."[84] And, in this case at least, consumers and other opponents of Plan Omega had an opportunity to state their views on Plan Omega at several public hearings held by the Interim Council during the initial review period.[85]

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84 The regulations contain the same requirement. 42 C.F.R. §100.105(b).

85 Three of the individual plaintiffs participated in those hearings. Affidavit of Amos M. Burke, Docket Item 21.

For these reasons, the Court holds that defendants HEW and Burke are entitled to summary judgment on the constitutional claims asserted against them.[86]

An Order will be entered in accordance with this Opinion.

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86 Since the Court has found that defendant Burke has not violated plaintiffs' rights under the Constitution or section 1122, he is entitled to summary judgment against the plaintiffs with respect to their claim against him under 42 U.S.C. §1983 (Docket Item 9, par. 59).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILMINGTON UNITED NEIGHBORHOODS, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, et al., Defendants.	Civil Action No. 77-439
WILMINGTON MEDICAL CENTER, INC., a non-profit corporation of the State of Delaware, Plaintiff, v. JOSEPH A. CALIFANO, JR., as Secretary of the DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, Defendant, and WILMINGTON UNITED NEIGHBORHOODS, Defendant-Intervenor.	Civil Action No. 77-480

J U D G M E N T

For the reasons stated in the Court's opinion entered on this date in this case, it is

ORDERED:

1. The motion of the plaintiffs in Civil Action No. 77-439 ("plaintiffs") to amend the first amended complaint in that action pursuant to Rule 15(a), F.R.Civ.P., (Docket Item 32) is hereby granted.

2. The motion of defendant United States Department of Health, Education and Welfare ("HEW") in Civil Action No. 77-439 to dismiss or, in the alternative, for summary judgment (Docket Item 17) will be treated as a motion for summary judgment and is hereby granted in favor of defendant HEW and against plaintiffs on all the claims asserted against HEW in Civil Action No. 77-439.

3. Because in Civil Action No. 77-480 defendant-intervenor Wilmington United Neighborhoods ("W.U.N.") filed a cross-claim (Docket Item 10) against the defendant Secretary of HEW ("Secretary") asserting the same claims as plaintiffs had asserted against

defendant HEW in Civil Action No. 77-439, and because summary judgment has been granted in favor of defendant HEW on the latter claims (¶2, supra), summary judgment is hereby entered in favor of defendant Secretary and against defendant-intervenor W.U.N. on its cross-claim in Civil Action No. 77-480.

4. The motion of defendants Amos M. Burke, as Director of the Bureau of Health Planning and Resources Development, and Robert H. Sweeney, as Chairman of the Interim State Comprehensive Health Planning Council, to dismiss (Docket Item 8) pursuant to Rule 12(b)(1) and (6), F.R.Civ.P., will be treated as a motion for summary judgment and summary judgment is hereby granted in favor of defendants Burke and Sweeney and against plaintiffs on all the claims asserted by plaintiffs in Civil Action No. 77-439 against those defendants.

5. Summary judgment is hereby entered in favor of defendant Delaware Health Council, Inc. and against plaintiffs on the claim asserted against that defendant by plaintiffs in Civil

Action No. 77-439 based on the law of the case (see ¶4, supra).

6. The motion in Civil Action No. 77-439 of defendant Wilmington Medical Center, Inc. ("WMC") to dismiss (Docket Item 15) pursuant to Rule 12(b)(b), F.R.Civ.P., will be treated as a motion for summary judgment and summary judgment is hereby entered in favor of defendant WMC and against the plaintiffs with respect to all the claims asserted against WMC in that action.

7. The motion in Civil Action No. 77-480 of plaintiff WMC to dismiss (Docket Item 13) pursuant to Rule 12(b), F.R.Civ.P., the counterclaim asserted against it by defendant-intervenor W.U.N. will be treated as a motion for summary judgment and summary judgment is hereby granted in favor of plaintiff WMC and against W.U.N. on the counterclaim.

8. The motion of plaintiffs in Civil Action No. 77-439 for partial summary judgment (Docket Item 28) against defendants HEW and Burke with respect to the issues set forth below is hereby denied:

(a) Whether defendant HEW violated the Due Process Clause of the Fifth Amendment by adopting regulations that require designated State planning agencies under section 1122 of the Social Security Act (42 U.S.C. § 1320a-1) to provide a fair hearing to proponents of a disapproved capital expenditure but not to opponents of an approved expenditure;

(b) Whether the failure of defendant HEW to make an independent finding as to whether Plan Omega is consistent with applicable standards, criteria, and plans when it originally approved Plan Omega and its refusal to do so upon reconsideration constitute a violation of section 1122;

(c) Whether defendant Burke violated the Equal Protection Clause of the Fourteenth Amendment by denying the request of plaintiffs DiPinto and W.U.N. for a fair hearing on his purported findings that Plan Omega was consistent with applicable standards, criteria, and plans, while making fair hearings available to proponents of capital

expenditures as to which negative findings had been made.

9. The motions of plaintiffs in Civil Action No. 77-439 (Docket Item 43) and defendant-intervenor W.U.N. in Civil Action No. 77-480 (Docket Item 23) for partial summary judgment against WMC on the issue whether the approval of Plan Omega by the Bureau of Comprehensive Health Planning expired on December 15, 1977 are hereby denied.

10. In view of the fact that summary judgment has been granted in favor of WMC and against defendant-intervenor W.U.N. with respect to W.U.N.'s counterclaim in Civil Action No. 77-480 (¶7, supra), the motion of WMC to amend its complaint in Civil Action No. 77-480 (Docket Item 41) is hereby denied.

11. Since summary judgment has been granted on the cross-claim and the counterclaim advanced by W.U.N. in Civil Action No. 77-480 (¶¶ 3 and 7, supra), the only claims remaining to be adjudicated are those asserted by plaintiff WMC in the complaint in that action.

Because the Court perceives no prejudice to any adverse party likely to result from the dismissal without prejudice of the remaining claims in Civil Action No. 77-480, the motion of WMC, the plaintiff in that action, for an order dismissing its complaint without prejudice (Docket Item 42), pursuant to Rule 41(a)(2), F.R.Civ.P., is hereby granted.

12. This Order shall constitute a final adjudication of all issues in the two abovementioned actions.

/s/ James L. Latchum
Chief Judge

Dated: September 22, 1978

Supreme Court, U. S.
FILED
MAY 6 1980
MICHAEL RODAK, JR., CLERK

APPENDIX C

VOLUME III

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,

Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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APPENDIX C

TITLE 42
OF THE UNITED STATES CODE

§ 1320a-1 * * *

(a) The purpose of this action is to assure that Federal funds appropriated under subchapters V, XVIII, and XIX of this chapter are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any of such subchapters and that, to the extent possible, reimbursement under such subchapters shall support planning activities with respect to health services and facilities in the various States.

. . .

(b) The Secretary, after consultation with the Governor (or other chief executive officer) and with appropriate local public officials, shall make an agreement with any State which is able and willing to do so under which a designated planning agency (which shall be an agency

described in clause (ii) of subsection (d)(1)(B) of this section) that has a governing body or advisory board at least half of whose members represent consumer interests) will —

(1) make, and submit to the Secretary together with such supporting materials as he may find necessary, findings and recommendations with respect to capital expenditures proposed by or on behalf of any health care facility or health maintenance organization in such State within the field of its responsibilities,

(2) receive from other agencies described in clause (ii) of subsection (d)(1)(B) of this section, and submit to the Secretary together with such supporting material as he may find necessary, the findings and recommendations of such other agencies with respect to capital expenditures proposed by or on behalf of health care facilities or health maintenance organizations in such State within the fields of their respective responsibilities, and

(3) establish and maintain procedures pursuant to which a person proposing any such capital expenditure may appeal a recommendation by the designated agency and will be granted an opportunity

> for a fair hearing by such agency or person other than the designated agency as the Governor (or other chief executive officer) may designate to hold such hearings

whenever and to the extent that the findings of such designated agency or any such other agency indicate that any such expenditure is not consistent with the standards, criteria, or plans developed pursuant to the Public Health Service Act (or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963) to meet the need for adequate health care facilities in the area covered by the plan or plans so developed.

. . .

(c) The Secretary shall pay any such State from the Federal Hospital Insurance Trust Fund, in advance or by way of reimbursement as may be provided in the agreement with it (and may make adjustments in such payments on account of overpayments or underpayments previously made), for the reasonable cost of performing the functions specified in subsection (b) of this section.

. . .

(d)(1) Except as provided in paragraph(2), if the Secretary determines that —

(A) neither the planning agency designated in the agreement described in subsection (b) of this section nor an agency described in clause (ii) of subparagraph (B) of this paragraph had been given notice of any proposed capital expenditure (in accordance with such procedure or in such detail as may be required by such agency) at least 60 days prior to obligation for such expenditure; or

(B)(i) the planning agency so designated or an agency so described had received such timely notice of the intention to make such capital expenditure and had, within a reasonable period after receiving such notice and prior to obligation for such expenditure, notified the person proposing such expenditure that the expenditure would not be in confirmity with the standards, criteria, or plans developed by such agency or any other agency described in clause (ii) for adequate health care facilities in such State or in the area for which such other agency has responsibility, and

(ii) the planning agency so designated had, prior to submitting to the Secretary the findings referred to in subsection (b) of this section —

(I) consulted with, and taken into consideration the findings and recommendations of, the State planning agencies established pursuant to sections 246(a) and 291d(a) of this title (to the extent that either such agency is not the agency so designated) as well as the public or nonprofit private agency or organization responsible for the comprehensive regional, metropolitan area, or other local area plan or plans referred to in section 246(b) of this title and covering the area in which the health care facility or health maintenance organization proposing such capital expenditure is located (where such agency is not the agency designated in the agreement), or, if there is no such agency, such other public or nonprofit private agency or organization (if any) as performs, as determined in accordance with criteria included in regulations, similar functions, and

(II) granted to the person proposing such capital expenditure an opportunity for a fair hearing with respect to such findings;

then, for such period as he finds necessary in any case to effectuate the purpose of this section, he shall in determining the Federal payments to be made under subchapters V, XVIII, and XIX of this

chapter with respect to services furnished in the health care facility for which such capital expenditure is made, not include any amount which is attributable to depreciation, interest on borrowed funds, a return on equity capital (in the case of proprietary facilities), or other expenses related to such capital expenditure. With respect to any organization which is reimbursed on a per capita or a fixed fee or negotiated rate basis, in determining the Federal payments to be made under subchapters V, XVIII, and XIX of this chapter, the Secretary shall exclude an amount which in his judgment is a reasonable equivalent to the amount which would otherwise be excluded under this subsection if payment were to be made on other than a per capita or a fixed fee or negotiated rate basis.

(2) If the Secretary, after submitting the matters involved to the advisory council established or designated under subsection (i) of this section, determines that an exclusion of expenses related to any capital expenditure of

any health care facility or health maintenance organization would discourage the operation or expansion of such facility or organization, or of any facility of such organization, which has demonstrated to his satisfaction proof of capability to provide comprehensive health care services (including institutional services) efficiently, effectively, and economically, or would otherwise be inconsistent with the effective organization and delivery of health services or the effective administration of subchapter V, XVIII, or XIX of this chapter, he shall not exclude such expenses pursuant to paragraph (1).

. . .

(f) Any person dissatisfied with a determination by the Secretary under this section may within six months following notification of such determination request the Secretary to reconsider such determination. A determination by the Secretary under this section shall not be subject to administrative or judicial review.

. . .

42 C.F.R. Part 100

§ 100.101 Applicability.

The provisions of this subpart are applicable to agreements entered into by the Secretary with the various States pursuant to section 1122 of the Social Security Act (42 U.S.C. Chap. 7), and to determinations made by the Secretary thereunder, for the purpose of assuring that Federal funds appropriated under titles V, XVIII, and XIX of the Social Security Act are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any such titles and that, to the extent possible, reimbursement under such titles shall support planning activities with respect to health services and facilities in the various States.

. . .

§ 100.103 Expenditures covered.

Any capital expenditure proposed by or on behalf of any health care facility or health maintenance organization,

the obligation for which is incurred by or on behalf of a health care facility or health maintenance organization after December 31, 1972, or after the effective date of the agreement entered into pursuant to § 100.104 by the Secretary and the State in which the health care facility or health maintenance organization is located . . . whichever is later, is subject to this subpart

. . .

(a)(1) For purposes of this subpart, a "capital expenditure" is an expenditure, including a force account expenditure (i.e., an expenditure for a construction project undertaken by the facility as its own contractor), which, under generally accepted accounting principles, is not properly chargeable as an expense of operation and maintenance and which (i) exceeds $100,000, or (ii) changes the bed capacity of the facility with respect to which such expenditure is made, or (iii) substantially changes the services of the facility with respect to which such expenditure is made.

. . .

(c) Obligation: An obligation for a capital expenditure shall be deemed to have been incurred by or on behalf of a health care facility or health maintenance organization.

(1) When an enforceable contract is entered into by such facility or organization or by a person proposing such capital expenditure on behalf of such facility or organization for the construction, acquisition, lease or financing of a capital asset;

. . .

§ 100.104 Agreement; general.

The Secretary, after consultation with the Governor (or other chief executive officer) and with appropriate public officials, shall make an Agreement with any State which is able and willing to enter into such an agreement under which a designated planning agency (which shall be an agency described in § 100.105) will submit to the Secretary, together with such supporting materials as the Secretary may require, the following:

(a) With respect to each capital expenditure proposed by or on behalf of a health care facility or health maintenance organization in such State, the findings of such designated planning agency as to whether

(1) The designated planning agency or any other agency described in § 100.105 had been given notice of such proposed capital expenditure (in accordance with such procedure or in such detail as may be required pursuant to § 100.106) at least 60 days prior to obligation for such expenditure; and

(2) Such expenditure is or is not consistent with the standards, criteria, or plans developed pursuant to the Public Health Service Act (or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963) to meet the need for adequate health care facilities in the area covered by the plan or plans so developed.

(i) In reaching such findings, the designated planning agency shall consult with, and take into consideration the

findings and recommendations of, the other agencies described in § 100.105.

(ii) Where the designated planning agency finds that such expenditure is not consistent with such standards, criteria, or plans, it shall submit to the Secretary the findings and recommendations of all such other agencies with which it has consulted.

(b) With respect to each proposed capital expenditure which is found by the designated planning agency to be not consistent with the standards, criteria, or plans described in paragraph (a) of this section, its recommendation as to whether the Secretary should either

(1) Exclude, in determining the Federal payments to be made under titles V, XVIII, and XIX of the Act with respect to services furnished in the health care facility or health maintenance organization for which such capital expenditure is made, expenses related to such capital expenditure (in accordance with section 1122(d)(1) of the Act); or

(2) Not exclude such expenses, on the ground that such facility or organization has demonstrated proof of capability to provide comprehensive health care services efficiently, effectively, and economically, and that such an exclusion would discourage the operation or expansion of such facility or organization, or of any facility of such organization.

(c) With respect to each proposed capital expenditure which is found by any other agency described in § 100.105 to be not consistent with the standards, criteria, or plans described in paragraph (a) of this section within the field of responsibilities of such other agency, the findings and recommendations of such other agency.

(d) With respect to each proposed capital expenditure as to which the designated planning agency reaches a finding contrary to that reached by the local area planning agency described in § 100.105(a)(3), a statement of the reasons for such a contrary finding.

. . .

§ 100.107 Agreement; criteria for agency review.

The Agreement shall set forth the criteria under which the designated planning agency and the other agencies described in § 100.105 shall evaluate proposals for capital expenditures for purposes of this subpart to determine their conformance with the applicable standards, criteria and plans referred to in § 100.104(a)(2). Such criteria, to the extent provided for under such standards, criteria, or plans, shall include the following:

(a) Whether the proposed project is needed or projected as necessary to meet the needs in the community in terms of health services required: Provided, That projects for highly specialized services (such as open-heart surgery, renal transplantation, or radiation therapy) which will draw from patient population outside the community in which the project is situated will receive appropriate consideration;

(b) Whether the proposed project can be adequately staffed and operated when completed;

(c) Whether the proposed capital expenditure is economically feasible and can be accommodated in the patient charge structure of the health care facility or health maintenance organization without unreasonable increases; and

(d) Whether the project will foster cost containment or improved quality of care through improved efficiency and productivity, including promotion of cost-effective factors such as ambulatory care, preventive health care services, home health care, and design and construction economies, or through increased competition between different health services delivery systems.

§100.108 Determination by the Secretary.

(a) Except as provided in paragraph (b) of this section, if the Secretary determines that (1) the designated planning agency has not been given timely notice of intention to make a capital expenditure in accordance with § 100.106, or (2) that the designated planning agency has, in accordance with the requirements of section 1122 of the Act

and this subpart, submitted to the Secretary its finding that such expenditure is not consistent with the standards, criteria, or plans described in § 100.104(a)(2) then, for such period as he deems necessary to effectuate the purpose of section 1122 of the Act, he shall, in determining the Federal payments to be made under titles V, XVIII, and XIX of the Act to such health care facility or health maintenance organization, exclude expenses related to such capital expenditure.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the Secretary, after submitting the matters involved to the National Advisory Health Council on Comprehensive Health Planning Programs (established pursuant to section 316 of the Public Health Service Act, 42 U.S.C. 247a) and after taking into consideration the recommendations of the designated planning agency and the other agencies described in § 100.105 with respect to such expenditure, determines that an exclusion of expenses related to any capital expenditure of any

health care facility or health maintenance organization would discourage the operation or expansion of such facility or organization, or of any facility of such organization, which has demonstrated to his satisfaction proof of capability to provide comprehensive health care services efficiently, effectively, and economically, or would otherwise be inconsistent with the effective organization and delivery of health services or the effective administration of titles V, XVIII, or XIX of the Act, he shall include such expenses in Federal payments under such titles.

(c) Upon making a determination under this section the Secretary will promptly notify the person proposing such capital expenditure, the designated planning agency, and the other agencies described in § 100.105 with which the designated planning agency has consulted, or such determination and the basis for such determination.

(d) Any person dissatisfied with a determination by the Secretary under section 1122 of the Act or this subpart

with respect to a particular capital expenditure may, within six months following the date of such determination, request the Secretary to reconsider such determination.

(1) Such request for reconsideration shall be in writing, addressed to the Secretary of Health, Education, and Welfare or to any officer or employee of the Department of Health, Education, and Welfare or to any officer or employee of the Department of Health, Education, and Welfare to whom the Secretary has delegated responsibility to receive such requests, and shall set forth the grounds upon the record of the proceedings and any issues of law, upon which such reconsideration is requested.

(2) Reconsideration will be based upon the record of the proceedings, which shall consist of the findings, recommendations and supporting materials submitted to the Secretary by the designated planning agency (including the findings and recommendations of other agencies) which relate to the findings and recommendations involved, the record

of the hearing provided by the designated planning agency, if any, and of any judicial proceedings, the materials submitted in connection with such request, and such comments as the Secretary may request from the designated planning agency.

(3) Notice of any reconsidered determination under this paragraph shall be sent to the designated planning agency and the person requesting such reconsideration.

(e) A determination by the Secretary is, under section 1122 of the Act, not subject to administrative or judicial review.

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,
Petitioners,

v.

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
TABLE OF CITATIONS	ii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
REASONS FOR THE DENIAL OF THE WRIT	4
I. Allegations of Undue Influence Do Not Serve to Permit Review Which Has Been Statutorily Precluded	4
II. Congress Clearly Intended to Preclude Judicial Review of Determinations Made by Designated Planning Agency	6
CONCLUSION	11

TABLE OF CITATIONS.

Cases: Page

Abbott Laboratories v. Gardner, 387 U. S. 136 (1967) 7
Barlow v. Collins, 397 U. S. 159 (1970) 7
D. C. Federation of Civic Associations v. Volpe, 459 F. 2d 1231 (D. C. Cir. 1972) 5
Johnson v. Robison, 415 U. S. 360 (1974) 4
Morris v. Gressette, 432 U. S. 491 (1971) 6, 9
NAACP v. Wilmington Medical Center, 453 F. Supp. 280 (D. Del. 1978) 2
NAACP v. WMC, 584 F. 2d 619 (3rd Cir. 1978) 8
Weinberger v. Salfi, 422 U. S. 749 (1975) 4, 5
Texas Medical Association v. Matthews, 408 F. Supp. 303 (W. D. Tex. 1976) 5

Statutes:

Five U. S. C. § 701(a) 6
Rehabilitation Act of 1973 (29 U. S. C. § 794), section 504 .. 2, 9
Title VI of the Civil Rights Act of 1964 (42 U. S. C. § 2000d) 2
Forty-two U. S. C. 1320a-1:
Section 1122 .....1, 2, 3, 4, 7, 8, 9, 10, 11
Section 1122(d)(1)(A) 7
Section 1122(d)(1)(B)(i) 7
Section 1122(f) 2, 4, 5, 8, 10

Miscellaneous:

H. R. Rep. No. 231, 92d Cong., 2d Sess., reprinted in 1972 U. S. Code Cong. and Admin. News 4989 11

QUESTIONS PRESENTED.

(1) Whether a statute precluding judicial review of a determination by a federal official precludes review of allegations of corruption against that official.

(2) Whether it may be fairly inferred that 42 U. S. C. 1320a-1 precludes review of determinations made by a state agency.

STATEMENT OF THE CASE.

Forty-two U. S. C. 1320a-1 (Section 1122 of the Social Security Act) empowers the Secretary of Health, Education and Welfare (hereinafter "Secretary") to enter into an agreement with state health planning agencies. By entering into such an agreement, the state planning agency undertakes the obligation to review capital expenditures of health care facilities in that state in order to determine whether such capital expenditures are consistent with the standards and criteria developed by the state agency in accordance with regulations implementing section 1122. The Bureau of Comprehensive Health Planning, (the designated planning agency for the State of Delaware, hereinafter "DPA") has undertaken such an obligation.

On March 19, 1976, the Wilmington Medical Center (hereinafter "WMC") submitted an application for a review of a proposed capital expenditure to the DPA. The plan (Plan Omega) called for the construction of a new hospital near Stanton, Delaware. In addition, two facilities currently operated by WMC would be closed. The plan also called for a third currently existing facility to be extensively renovated and modernized.

The DPA and its advisory board undertook extensive review of the plan. Public hearings were conducted on

four different dates at different locations. After receiving comments of its advisory board and after the staff of the DPA had completed its own study, Plan Omega was approved on June 16, 1976. On August 6, 1976, HEW approved Plan Omega for section 1122 purposes.

On September 10, 1976, a civil action was filed in District Court for the District of Delaware, *NAACP, et al. v. Wilmington Medical Center, et al.*, 453 F. Supp. 280 (D. Del. 1978). In that suit it was alleged that Plan Omega violated Title VI of the Civil Rights Act of 1964 (42 U. S. C. § 2000d) and section 504 of the Rehabilitation Act of 1973 (29 U. S. C. § 794). The Court ordered that HEW undertake a study to determine whether Plan Omega was violative of those laws. As a result of a study performed by HEW, WMC and HEW entered into an agreement by which HEW was assured of WMC's future compliance with the provisions of Title VI. The accord reached between WMC and HEW provided, among other things, that WMC would provide a system of transportation for patients to the suburban location, institute patient allocation systems for services which were available at both locations and alter construction and renovation plans in order to accommodate handicapped persons.

In the interim, on February 4, 1977, pursuant to section 1122(f), petitioners requested that the Secretary reconsider his determination that Plan Omega was acceptable for section 1122 purposes. On September 7, 1977, Harold Margulies, M.D., acting on behalf of the Secretary rendered a decision that the DPA's review was consistent with the requirements of section 1122. However, Dr. Margulies went on to comment that changes in the original plan which would be required in order for WMC to meet its obligations under the agreement with HEW, might require WMC to submit those changes to the DPA for additional section 1122 approval. By a letter

dated October 12, 1977 to petitioners' counsel, Dr. Margulies further clarified his decision on reconsideration. In that letter, Dr. Margulies stated that while it was possible that his decision on reconsideration could be interpreted as requiring that Plan Omega, as modified, undergo a new section 1122 review, such was not the case and his decision was intended to indicate that an additional section 1122 review was required only if those changes in Plan Omega necessitated by WMC's agreement with HEW were such as to require separate section 1122 review of those changes.

On September 30, 1977, the Secretary received a letter from Irving Shapiro, Chairman of the Board of the DuPont Company, requesting the Secretary's attention to a letter from an official of WMC. On November 11, 1977, petitioners instituted this action in Federal District Court. The complaint alleged that DPA had failed to consider the standards and criteria set forth in its agreement with HEW in reviewing Plan Omega and that the Shapiro letter was the underlying reason for the Secretary's determination that the modifications of Plan Omega necessitated by WMC's agreement with HEW need undergo section 1122 review only if those modifications fit within the statutory prerequisites for section 1122 review.

The trial court ruled that it was precluded from reviewing determinations made by the Secretary and the DPA pursuant to a section 1122 review. The decision of the District Court was affirmed by the Third Circuit Court of Appeals.

REASONS FOR DENIAL OF THE WRIT.

I. Allegations of Undue Influence Do Not Serve to Permit Review Which Has Been Statutorily Precluded.

Section 1122(f) provides:

> A determination made by the Secretary under this section shall not be subject to administrative or judicial review.

Petitioners argue the determination made by the Secretary that modifications of Plan Omega necessitated by WMC's agreement with HEW need be reviewed only if those modifications met the statutory prerequisites for section 1122 review, was the result of undue influence. They contend that if the Secretary's determination was the result of improper influence, such determination was not made pursuant to the provisions of section 1122 and therefore, the determination may be reviewed by a court. As authority for this proposition, petitioners cite *Johnson v. Robison*, 415 U. S. 360 (1974) and *Weinberger v. Salfi*, 422 U. S. 749 (1975). Neither authority is applicable here.

In *Johnson v. Robison*, this Court was requested to review the constitutionality of a statute which had been applied by a federal administrator in reaching his determination. In that case, the act provided that no federal court shall have the power to review the decision reached by the administrator pursuant to the act. In *Johnson* there was no complaint that the administrator inappropriately applied the provisions of the act, rather the allegation was that the act itself was unconstitutional. This Court ruled that the language contained in the act precluding judicial review of the decision of the administrator does not prohibit a federal court from considering the constitutionality of the law which the administrator is to apply.

Additionally, *Weinberger v. Salfi, supra,* does not deal at all with the issue whether allegations that a determination was the result of undue influence will permit judicial review of an administrator's determination where such review has been precluded by law.

Logic dictates that allegations of undue influence should not permit potential plaintiffs to gain access to court review where it has been otherwise precluded by the express intention of the Congress. The charge of undue influence is simply another way of alleging that the administrator misapplied or ignored standards or criteria for decision set down in the act pursuant to which the decision is rendered or that a decision was rendered where there was no substantial evidence on the record to permit such a determination to be made. Section 1122(f) explicitly precludes review, even on those common grounds for review of administrative agency action. Clearly, one of the reasons for limiting judicial review is to prevent delays in implementing the decision of the administrator which may be occasioned by litigating such questions. To permit judicial review which has otherwise been precluded upon an allegation that the decision reached by an administrator was the result of undue influence will permit those who may be anxious to litigate the question of the lack of substantial evidence or arbitrariness access to the courts where Congress clearly intended to preclude such litigation.

Petitioners have also cited *D. C. Federation of Civic Associations v. Volpe,* 459 F. 2d 1231 (D. C. Cir. 1972) and *Texas Medical Association v. Matthews,* 408 F. Supp. 303 (W. D. Tex. 1976) as additional authority for the proposition that even where a statute has expressly precluded judicial review of a determination, courts may still review such a determination where undue influence has been alleged. These cases are also inapposite. Both cases

stand for the proposition that an administrator's determination may be ruled invalid if it has been demonstrated that such a determination was directly caused by some undue influence. However, in neither was judicial review of the administrator's determination precluded by statute.

This Court has directly considered the question whether an allegation of undue influence will serve to permit judicial review which has otherwise been precluded. In *Morris v. Gressette,* 432 U. S. 491 (1971) this Court indicated the following in footnote 24 of page 507 of its Opinion:

> The United States suggests that there should be limited judicial review only when the Attorney General improperly relinquishes his responsibility to evaluate independently the submitted legislation in light of the standards established by § 5 . . . For the reasons stated in the text, we think Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act.

The cases cited by the petitioners do not support the proposition that where judicial review of an administrative determination has been precluded, an allegation of undue influence will permit review of such a determination. This Court has specifically indicated an allegation that an administrative decision which was not independently made on the statutory bases for such a determination will not permit a court to review the administrative determination where judicial review has been precluded.

II. Congress Clearly Intended to Preclude Judicial Review of Determinations Made by the Designated Planning Agency.

Five U. S. C. § 701(a) provides that determinations made by federal administrative agencies are subject to judicial review except to the extent that Congress has precluded such review. Judicial review of final agency action will not be precluded unless there is persuasive reason to believe such was the intent of Congress. *Abbott Laboratories v. Gardner,* 387 U. S. 136 (1967). A court which has been requested to review final agency action must determine whether "Congress has in express or implied terms precluded judicial review". *Barlow v. Collins,* 397 U. S. 159, 165 (1970). If judicial review has not been expressly precluded by statute, the court requested to review administrative action must determine "whether nonreviewability can be fairly inferred". Id., 397 U. S. at 166.

While there is no express language precluding judicial review of a state agency's section 1122 determination, it may be fairly inferred that Congress intended that the state agency's determination not be subject to judicial review. Section 1122(d)(1)(A) provides that the person proposing capital expenditure must notify the state agency of its intention only sixty days prior to undertaking an obligation for such expenditure. Section 1122(d)(1)(B)(i) provides that the Secretary may not withhold federal reimbursement for that portion of claims representing a proposed capital expenditure, unless prior to the undertaking of the obligation for the expenditure, the state agency has informed the person proposing the capital expenditure that such expenditure is not in conformity with the section 1122 standards it has established.

Basically, section 1122 provides that unless a state agency fails to make a negative determination as to the

acceptability of a proposed capital expenditure within as little as sixty days, such expenditure will be deemed approved. In addition, if the state agency has positively recommended section 1122 approval of a proposed expenditure to the Secretary, the Secretary is confined to making a ministerial determination that proper procedures were followed. The Secretary does not have the ability to review each proposal and make a separate determination as to its necessity, nor does he have the more limited ability of assuring that there was substantial evidence to support the determination made by the DPA. See *NAACP v. WMC*, 584 F. 2d 619 (3rd Cir. 1978). The review procedure set forth in section 1122 is a very streamlined one. The state agency must complete its review in as little as sixty days. Unless the state agency makes a negative determination in as short a period as sixty days, it is deemed to have approved the proposed capital expenditure. If the state agency makes a determination that the expenditure is necessary or fails to make a determination that it is necessary within a relatively short time, the Secretary is then limited to a ministeria! review to insure that proper procedures are followed. In the case of a negative recommendation by the state agency, the Secretary's duties become somewhat more expanded, but it is clear that the procedure remains a relatively streamlined one.

Congress attempted to insure that after the Secretary's determination had been made, the procedure would remain streamlined by precluding judicial review of the Secretary's determination by the provisions of section 1122(f). Congress recognized that judicial review of determinations made pursuant to section 1122 could have the effect of greatly delaying proposed capital expenditures. In view of inflation, such delay may have the effect of greatly increasing the cost of a proposed ex-

penditure, an effect which runs contrary to the central purpose of section 1122 review. In light of the streamlined procedure adopted by Congress in section 1122 and the clearly expressed intent of Congress that determinations of the Secretary not be subject to judicial review, it may fairly be inferred that Congress intended that judicial review of determinations made by the DPA should be similarly precluded.

A procedure similar to that set forth in section 1122 was reviewed by this Court in *Morris v. Gressette,* 432 U. S. 491 (1971). In that case, the streamlined procedures set forth in the act under review in large measure supported this Court's determination that a decision reached by the Attorney General pursuant to that Act was not subject to judicial review.

The Voting Rights Act provides that before a state subject to the Act can change any voting qualifications, it must first submit the proposed change to either the United States District Court or the Attorney General of the United States. If the state choose to submit the plan to the Attorney General, it can not effectuate the change unless the Attorney General failed to interpose an objection to it within sixty days after it was submitted.

Although § 5 of the Voting Rights Act does expressly preclude judicial review of the determination made by the Attorney General, this Court recognized that Congress selected the alternate procedure of submitting the proposed change to the Attorney General's Office for comment by him within sixty days in order to permit implementation of the change without undue delay. At page 504 of its Opinion, this Court stated:

> The Congressional intent is plain. The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come

> to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenge to the implemented legislation, there also was to be no "dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

In light of Congress' intent that such changes be permitted to be rapidly implemented where the Attorney General had failed to find such change objectionable, this Court found that it could be fairly inferred that Congress intended to preclude judicial review of the Attorney General's failure to interpose a timely objection. It is clear that Congress intended that section 1122 review should also be a speedy one. In section 1122, Congress took the further action of precluding judicial review of the Secretary's determinations. Such action is further evidence of Congress's intent to preclude judicial review of the entire section 1122 process.

In light of the Secretary's limited role in the case of a positive determination made by the DPA, it would be a most odd result to permit review of the substantive determinations made by the DPA, yet exclude review of the ministerial actions of the Secretary. If the intent of Congress in prohibiting judicial review of the Secretary's determination under section 1122(f) was to permit rapid final action under section 1122, such intent would be clearly defeated if the substantive determinations made by the DPA can be reviewed by the courts.

Finally, the conclusion that Congress intended to preclude judicial review is further compelled by the legislative history cited by both District Court and Third Circuit Court of Appeals indicating that Congress intended section 1122 review "would in no way change the au-

tonomy of authority of the existing state or local agencies," H. R. Rep. No. 231, 92d Cong. 2d Sess., *reprinted in* 1972 U. S. Code Cong. and Admin. News 4989, 5066. The intent of Congress to give state agencies as much autonomy as possible is reflected in the limited role to be performed by the Secretary in section 1122 review. The judicial review by federal courts of determinations made by the state agency would not only undermine the agency's autonomy, it would indeed be an odd result in light of the limited role of the Secretary.

Section 1122, its legislative history and logic dictates that conclusion that Congress intended the determinations made by the DPA pursuant to a section 1122 review should not be subject to judicial review.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should be denied.

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v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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WILMINGTON UNITED NEIGHBORHOODS, ET AL., PETITIONERS*

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether Section 1122(f) of the Social Security Act, 42 U.S.C. 1320a-1(f), which expressly precludes judicial review of certain determinations by the Secretary of Health and Human Services, precludes judicial review

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*Additional petitioners are Edith Beck, John J. Bradley, Frances Bradley, Joseph J. Breen, Thomas X. Carroll, Joseph G. DiPinto, Ethel B. Tynes, and Alice Wilson.

Additional respondents are Amos M. Burke, as Director of the Bureau of Health Planning and Resources Development, Robert H. Sweeney, Delaware Health Council, Inc., and Wilmington Medical Center, Inc.

when the Secretary's determination is alleged to be the product of improper influence.

2. Whether Section 1122(f) of the Social Security Act, 42 U.S.C. 1320a-1(f), implicitly authorizes federal judicial review of substantive state health care planning decisions.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 7

Briscoe v. *Bell*, 432 U.S. 404 7

D.C. Fed. of Civic Ass'ns v. *Volpe*, 459 F. 2d 1231, cert. denied, 405 U.S. 1030 8

Johnson v. *Robison*, 415 U.S. 361 8

Lakeside Mercy Hospital v. *Ind. State Bd. of Health*, 421 F. Supp. 193, aff'd, 547 F. 2d 1170 10

NAACP v. *Wilmington Medical Center, Inc.*, 436 F. Supp. 1194, aff'd, 584 F. 2d 619 3

NAACP v. *Wilmington Medical Center, Inc.*, 453 F. Supp. 280, rev'd, 599 F. 2d 1247 .... 3, 4

Tex. Med. Ass'n v. *Mathews*, 408 F. Supp. 303 8

Union Pacific R.R. v. *Sheehan*, 439 U.S. 89 7

Statutes and regulations:

Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d 3, 4, 5

Page

Statutes and regulations—Continued:

National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C) 3

Rehabilitation Act of 1973, Section 504, 29 U.S.C. 794 ..... 3, 4, 5

Social Security Act, Title XI, 42 U.S.C. (& Supp. II) 1301 *et seq.*:

Section 1122, 42 U.S.C. (& Supp. II) 1320a-1 ..... 1, 2, 3, 4, 5, 8

Section 1122(a), 42 U.S.C. (Supp. II) 1320a-1(a) 1

Section 1122(d)(1)(B)(i), 42 U.S.C. 1320a-1(d)(1)(B)(i) 7

Section 1122(d)(2), 42 U.S.C. (Supp. II) 1320a-1(d)(2) 2, 10

Section 1122(f), 42 U.S.C. 1320a-1(f) 2, 5, 6, 7, 9

42 C.F.R. 100.104 2

42 C.F.R. 100.106(a)(4) 7

Miscellaneous:

H.R. Rep. No. 92-231, 92d Cong., 1st Sess. (1971) 1, 2, 9

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 615 F. 2d 112. The opinion of the district court (Pet. App. 34a-113a) is reported at 458 F. Supp. 628.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1980. The petition for a writ of certiorari was filed on May 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted Section 1122 of the Social Security Act, 42 U.S.C. (& Supp. II) 1320a-1, "to assure that Federal [reimbursement] funds * * * are not used to support unnecessary capital expenditures made by or on behalf of health care facilities * * * and [to assure] that, to the extent possible, reimbursement * * * shall support planning activities with respect to health services and facilities in the various States" (42 U.S.C. (Supp. II) 1320a-1(a))). Section 1122 authorizes the Secretary to enter into agreements with individual states, whereby otherwise available federal reimbursements for capital costs incurred by health care providers, such as depreciation and interest, may be withheld if the state has determined that such capital expenditures are inconsistent with state and local plans for the development of health care facilities.

In enacting Section 1122, Congress intended to use the purchasing power of the federal government to encourage health care providers to conform their capital expenditures to state and local plans, and thereby give added authority to those decisions. See H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 79-80 (1971). At the same time, Congress sought to minimize federal intrusion in this

area. As the House Report remarked, Section 1122 "in no way change[s] the autonomy or authority of existing State or local planning agencies * * *." *Id.* at 80.

A health care provider who plans a capital expenditure in a participating state must secure the approval of a designated local planning agency ("DPA"), which must decide whether the proposed capital expenditure is consistent with applicable state health care plans, standards, and criteria (42 C.F.R. 100.104). That determination is then forwarded to the Secretary. If the DPA has determined that the proposed expenditure conforms to the relevant state plans, the Secretary may review the decision only to determine whether correct procedures have been followed; he cannot make an independent determination of whether the expenditure complies with the state plans. If the DPA followed appropriate procedures, the Secretary must issue a determination that federal reimbursements will not be withheld (Pet. App. 6a).[1] This determination is "not * * * subject to administrative or judicial review" (42 U.S.C. 1320a-1(f)).

2. Respondent Wilmington Medical Center (WMC), a private non-profit hospital, is the principal health care provider for New Castle County, Delaware. In 1976, after more than ten years of planning and research concerning the area's changing health care needs, WMC adopted "Plan Omega," which proposed a major reorganization of WMC's principal inner-city divisions, as well as the

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[1]If the DPA has disapproved a proposed capital expenditure, the Secretary nonetheless may decide to reimburse the provider for that expenditure in certain circumstances (42 U.S.C. (Supp. II) 1320a-1(d)(2)). But the Secretary's decision to reimburse would be made only after the funds had actually been expended, so the uncertainty of reimbursement remains a significant deterrent to the undertaking of unapproved and disapproved projects.

construction of new hospital facilities in other parts of the county (Pet. App. 4a).

Because Delaware participates in the Section 1122 program, WMC applied in March 1976 to the state DPA for approval of the capital expenditures that would be required under Plan Omega. The DPA conducted public hearings and solicited recommendations from local health planning agencies (Pet. App. 6a-7a & n.1). The local agencies approved WMC's proposal, and the DPA thereafter advised the Secretary that Plan Omega was consistent with relevant state plans. In August 1976, the Secretary issued his Section 1122 approval (Pet. App. 6a-7a).

In September 1976, an action was brought by petitioner Wilmington United Neighborhoods and other parties, claiming that WMC's plan violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See *NAACP* v. *Wilmington Medical Center, Inc.*, 453 F. Supp. 280, 289-290 (D. Del. 1978).[2] The district court instructed the Secretary "to address the allegations of the complaint * * * as if it had been filed administratively and

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[2]WMC's adoption of Plan Omega has resulted in numerous legal challenges on various grounds. In *NAACP* v. *Wilmington Medical Center, Inc.*, 436 F. Supp. 1194 (D. Del. 1977), aff'd, 584 F. 2d 619 (3d Cir. 1978), certain persons who opposed the plan unsuccessfully contended that the Secretary's approval constituted major federal action requiring an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). In *Wilmington Medical Center, Inc.*, 453 F. Supp. 280, 293-303 (D. Del. 1978), rev'd, 599 F. 2d 1247 (3d Cir. 1979), the district court held that Title VI and Section 504 of the Rehabilitation Act afforded no private right of action to challenge the plan. The court of appeals reversed and remanded the case for further proceedings. The district court entered judgment for WMC on May 13, 1980 (No. 76-298), and an appeal is now pending in the court of appeals (No. 80-1893).

to determine whether Plan Omega, if implemented, [would] violate Title VI or Section 504" (*id.* at 290; footnote omitted). The Secretary thereafter undertook "an unprecedented investigation which spanned more than six months and produced a massive record exceeding six thousand pages" (*id.* at 291-292; footnote omitted). On July 5, 1977, the Secretary issued an opinion that the plan, as then constituted, would violate Title VI and Section 504. The Secretary also enumerated 12 areas in which the plan would have to be modified to achieve compliance with the statutes and applicable regulations (*id.* at 292). "After more than three months of discussions, an agreement was finally executed on November 1, 1977" (*ibid.*). Under the agreement, WMC agreed to make certain changes in its plan, and the Secretary agreed that the plan, as modified, would satisfy applicable statutory and regulatory requirements (*ibid.*).[3]

Meanwhile, in February 1977, petitioners requested that the Secretary reconsider his Section 1122 determination. On September 7, 1977, the Secretary reaffirmed that determination. Certain language appeared in the Secretary's September 7 letter, however, that may have suggested that WMC would be required to resubmit Plan Omega, in its entirety, to the DPA. On October 12, 1977, the Secretary corrected that impression in a letter which stated that resubmission of the entire plan was unnecessary and inconsistent with Section 1122 and relevant administrative regulations (Pet. App. 7a-8a).

3. Petitioners subsequently brought this action in the United States District Court for the District of Delaware,

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[3]WMC agreed: (1) to provide a transportation system for patients, employees, and visitors between the urban and suburban locations; (2) to institute a patient allocation system for services that are available at both locations; and (3) to provide facilities for the accommodation of handicapped persons (Pet. App. 7a).

challenging virtually all aspects of the Section 1122 process. Among other things, petitioners claimed that the Secretary's conclusion that WMC need not seek the DPA's approval for changes required to bring the plan into compliance with Title VI and Section 504 was the result of "the influence of a personal friend of the President" (Pet. App. 13a). Recognizing that Section 1122(f) explicitly precludes judicial review of the Secretary's decisions in this area, petitioners urged that an exception should be made when it is alleged that the decision resulted from improper influence. The district court rejected that contention (*id.* at 68a-70a).

Petitioners also argued that the statutory preclusion of judicial review did not render state DPA decisions unreviewable in the federal courts. Consequently, petitioners sought to establish that the Delaware DPA's approval of WMC's plan was substantively incorrect because it was inconsistent with the relevant state plans (Pet. App. 15a). The district court concluded, however, that Section 1122 implicitly precludes federal judicial review of substantive decisions made by state planning agencies. The district court noted (*id.* at 76a-77a; footnote omitted):

> [The Secretary] has no discretion to determine whether the proposed expenditure is unwise. The limited role of the Secretary under section 1122 clearly evinces Congress' intent to avoid Federal interference with substantive planning decisions made on the State and local level. Given the prohibition on judicial review of the Secretary's decision set forth in section 1122(f), it is inconceivable that Congress could have intended the Federal judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of a proposed capital expenditure.

The court of appeals affirmed, with one judge dissenting in part (Pet. App. 1a-33a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' claims warrant no further review.

1. Petitioners present two arguments in an effort to avoid the unequivocal bar to judicial review provided in Section 1122(f). First, petitioners contend that the Secretary's determination of October 12, 1977, that WMC need not seek additional DPA review of Plan Omega was influenced by Irving Shapiro, a private citizen who petitioners characterize as a "powerful advisor and friend of the President" (Pet. 21).[4] Petitioners argue that Section 1122(f) "does not explicitly preclude review of improper influence or corruption causes" (Pet. 23). Second, petitioners contend for the first time that the Secretary's determination was "not made under that statute [and] therefore, the cause is not precluded from judicial review" (Pet. 16) because it was made "on the basis of [Shapiro's] influence" (Pet. 22).

Petitioners' contentions lack merit. First, Section 1122(f) plainly and categorically precludes review: "A determination by the Secretary under this section shall

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[4]The "influence" allegedly came in the form of a letter, the full text of which is as follows: "My valued associate, Joe Dallas [Board Chairman of WMC] asked my advice on how best to place his letter before you. I agreed to send it to you, and I add my plea that you give it your attention. Its subject is of serious concern." Pet. App. 13a n.8. Mr. Dallas' letter merely recounts the history of the development of Plan Omega and suggests that the Secretary's September 1977 determination misconstrued relevant regulations to the extent that it suggested any need for further DPA review (*ibid.*).

not be subject to administrative or judicial review." 42 U.S.C. 1320a-1(f). Although petitioners contend that preclusion of judicial review is unwarranted whenever some "improper influence" is alleged, Section 1122(f) provides for no such exception, and there is no authority for asserting that the courts may create one. On the contrary, this Court has repeatedly emphasized that statutes precluding judicial review must be read to "mean what they say." *Briscoe* v. *Bell*, 432 U.S. 404, 411 (1977). See also *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89 (1978).[5]

Petitioners argue alternatively (Pet. 22) that Section 1122(f) does not preclude judicial review in this case because the Secretary's determination was not made "under the statute." That argument was not presented below, and it is not properly raised here. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the claim is groundless. In holding that the Secretary's decision was "manifestly unreviewable" (Pet. App. 14a), the court of appeals agreed with the district court that the Secretary's October 12 letter demonstrates

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[5] In precluding judicial review Congress was mindful that the public interest requires expeditious handling of applications made by health care providers. Congress provided that DPA decisions must be made within "a reasonable period" (42 U.S.C. 1320a-(d)(1)(B)(i)), which the Secretary has defined as 90 days (42 C.F.R. 100.106(a)(4)). Unfavorable decisions made after the expiration of that period are treated as favorable decisions, and reimbursements may not be withheld. Congress certainly did not intend to countenance a delay such as this record shows.

Of course, even if there were an implied exception in Section 1122(f) in these circumstances, judicial review would be limited to determining whether the Secretary's decision was the result of any "improper influence." The Shapiro letter hardly evidences such influence. See also WMC Br. in Opp. 6.

on its face that his determination was based on his understanding of the statute and regulations (*ibid.*):

> As the October 12 letter to [petitioners'] counsel illustrates * * *, the Secretary based his decision on his interpretation of the statute and the regulations implementing it. The fact that * * * the Secretary's decision may have been influenced by a letter from a business leader and personal friend of the President is irrelevant, because * * * section 1122(f) would still preclude judicial review. *See Briscoe* v. *Bell*, *supra*, 432 U.S. at 409-15.

Moreover, as the district court noted, the Secretary's construction of the relevant statutory and regulatory materials "is clearly not an unreasonable one" (Pet. App. 69a n.52). The Secretary's determination concerned a question arising under Section 1122 and constituted a reasonable interpretation of that section. In no meaningful sense can the determination be said not to be "under" Section 1122.[6]

2. Petitioners also contend (Pet. 24-30) that they are entitled to federal judicial review of their claim that the state DPA incorrectly determined that Plan Omega was consistent with relevant state health care plans. Because

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[6]Petitioners' reliance (Pet. 19) on *Johnson* v. *Robison*, 415 U.S. 361 (1974), is misplaced because that case involved the constitutionality of a federal statute, rather than the legality of administrative action taken pursuant to statutory authority. Similarly, *D.C. Fed. of Civic Ass'ns* v. *Volpe*, 459 F. 2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972), and *Tex. Med. Ass'n* v. *Mathews*, 408 F. Supp. 303 (W.D. Tex. 1976), do not support petitioners' position. In neither of those cases, which involved allegations of improper congressional influence in administrative decisions, did any statute preclude judicial review. Both cases considered only the proper *scope* of authorized judicial review, not the *power* to undertake review in the face of a statute that explicitly precluded such review.

Section 1122(f) explicitly precludes judicial review only of the Secretary's determinations, petitioners claim that they are free to challenge the DPA's determination in federal court. Both courts below rejected this argument, correctly discerning a clear congressional intention to preclude federal judicial review of state substantive decisions in this area. See Pet. App. 15a-18a.

The legislative history shows that Congress intended substantive health care planning decisions to be made by the states: "[Section 1122] would *in no way change the autonomy or authority of existing State or local planning agencies*, or the relationship between such agencies, either within States or across State lines." H.R. Rep. No. 92-231, *supra*, at 80 (emphasis added). As the court of appeals noted, the "surest way to change the autonomy or authority of existing State or local planning agencies' is to hold that the DPA's determinations are reviewable" (Pet. App. 16a). Congress further emphasized its intention by precluding even the Secretary from reviewing the substantive aspects of favorable decisions rendered by a DPA. Given the Secretary's expertise in matters of health care planning, "it is inconceivable that Congress could have intended the Federal Judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of a proposed capital expenditure" (*ibid.*). Moreover, as the court of appeals remarked, it is equally unlikely that Congress

would have provided for federal judicial review of state decisions, while prohibiting such review of the Secretary's decisions (see Pet. App. 17a).[7]

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[7]Petitioners' arguments to the contrary are insubstantial. First, petitioners assert (Pet. 15) that state autonomy cannot be a vital part of the legislative scheme because the Secretary is authorized to "reverse" DPA capital expenditure disapprovals. In fact, the Secretary cannot "reverse" a state's finding that an expenditure is inconsistent with state health care plans. At most, he may determine that federal interests would be served by using federal funds, in special circumstances, to reimburse a provider who has not secured state approval. 42 U.S.C. (Supp. II) 1320a-1(d)(2). See note 1, *supra*.

Second, petitioners assert (Pet. 27) that federal judicial review is necessary to insure "uniformity" in the nationwide administration of this federal program. That assertion is ill-founded because the very purpose of this program is to guarantee that substantive decisions will be made at the state and local levels (see Pet. App. 17a). The role of the federal government is limited to creating a financial incentive for providers to conform their expenditures to state and local plans. Petitioners incorrectly assert that the court of appeals' decision "would leave to State agencies the interpretation and application of federal regulations, with the possibility that there could be 50 different interpretations and applications" (Pet. 27; footnote omitted). No state interpretation of federal regulations is involved here. Each state develops its own health care plans, and it is appropriate that the states should interpret those plans.

Finally, petitioners' reliance on *Lakeside Mercy Hospital* v. *Ind. State Bd. of Health*, 421 F. Supp. 193, 201 (N.D. Ind.), aff'd, 547 F. 2d 1170 (7th Cir. 1976) (table), is misplaced. In that case, the district court was called upon to determine whether a hospital was automatically entitled to reimbursements when the state DPA (under the restraint of a state court injunction) failed to grant or deny approval during the time set by federal law (see page 7, note 5, *supra*). The question presented—whether the federal time limits had been tolled by the state court injunction—is clearly different from that presented here. Moreover, while the court found the evidence of alleged DPA wrongdoing unpersuasive, the court reached that issue only because a full record had been established on a motion for summary judgment. At the same time, the court indicated its view that the plaintiffs lacked standing in any event (421 F. Supp. at 206). The court of appeals' summary affirmance establishes no conflict in these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,
Petitioners,

v.

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENT WILMINGTON MEDICAL CENTER, INCORPORATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute and Regulations Involved	2
Counterstatement of the Case	2
Argument	8
The Decision Below Is Clearly Correct and in Harmony With Relevant Decisions of This Court	8
Conclusion	15

TABLE OF CITATIONS.

Cases:	Page
Abbott Laboratories v. Gardner, 387 U. S. 136 (1967)	11
Barlow v. Collins, 397 U. S. 159 (1970)	11
Briscoe v. Bell, 432 U. S. 404 (1977)	8, 9, 10
Briscoe v. Levi, 535 F. 2d 1259 (D. C. Cir. 1976)	8
Califano v. Sanders, 430 U. S. 99 (1977)	10
Dunlop v. Bachowski, 421 U. S. 560 (1975)	11
Johnson v. Robinson, 415 U. S. 361 (1974)	9, 10
Lakeside Mercy Hospital v. Indiana State Board of Health, 421 F. Supp. 193 (N. D. Ind.), aff'd without opinion 547 F. 2d 1170 (7th Cir. 1976)	14
Morris v. Gresette, 432 U. S. 491 (1977)	12
NAACP v. Wilmington Medical Center, Inc., 584 F. 2d 619 (3d Cir. 1978)	3, 11
NAACP v. Wilmington Medical Center, Inc., 436 F. Supp. 1194 (D. Del. 1977), aff'd 584 F. 2d 619 (3d Cir. 1978)	3
NAACP v. Wilmington Medical Center, Inc., 453 F. Supp. 280 (D. Del. 1977)	4
NAACP v. Wilmington Medical Center, Inc., 599 F. 2d 1247 (3d Cir. 1979)	4
NAACP v. Wilmington Medical Center, Inc., — F. Supp. — (D. Del. 1980) (slip opinion, No. 76-298, May 13, 1980)	4
Union Pacific Railway Company v. Sheehan, 439 U. S. 89 (1978)	10
Weinberger v. Salfi, 422 U. S. 749 (1975)	9

Statutes and Regulations:	
28 U. S. C. § 1254(1)	2
29 U. S. C. § 794	3, 4, 5
42 U. S. C. § 405(h)	9
42 U. S. C. § 1320a-1	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14
42 U. S. C. § 1973b	8
42 U. S. C. § 2000d	3
42 U. S. C. § 4332(a)	3
Fed. R. Civ. P. 15(a)	7
42 C. F. R. § 100.101 et seq.	2, 5, 12

TABLE OF CITATIONS (Continued).

Miscellaneous: **Page**

H. R. Rep. No. 231, 92d Cong., 2d Sess., reprinted in [1972] U. S. Code Cong. & Admin. News 4989, 5066 .....11, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-1767.

WILMINGTON UNITED NEIGHBORHOODS, et al.,
Petitioners,

v.

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT WILMINGTON MEDICAL CENTER, INCORPORATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit (Appendix A to the Petition) is reported at 615 F. 2d 112. The opinion of the District Court for the District of Delaware (Appendix B to the Petition) is reported at 458 F. Supp. 628.

JURISDICTION.

The judgment of which review is sought was entered on February 6, 1980. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The questions presented, as framed in the Petition, are:

1. Whether a statutory provision precluding judicial review of determinations by a federal official precludes review of allegations of corruption against that official.

2. Whether there is judicial review of the actions of State agencies in interpreting and applying the standards and criteria set forth in a federal statute and its implementing regulations, where the federal statute does not expressly preclude such review.

STATUTE AND REGULATIONS INVOLVED.

The statute and regulations involved in this matter are Section 1122 of the Social Security Act (42 U. S. C. § 1320a-1 et seq.) and its implementing regulation (42 C. F. R. §§ 100.101-100.109). The statute and regulations are set forth, in part, in Appendix C to the Petition.

COUNTERSTATEMENT OF THE CASE.

This action relates to the approval under Section 1122 of the Social Security Act, 42 U. S. C. § 1320a-1 ("Section 1122") by the Secretary (the "Secretary") of the United States Department of Health, Education and Welfare ("HEW") and the appropriate State agencies of the

plan of the Wilmington Medical Center, Incorporated ("WMC") to relocate certain of its hospital facilities and to renovate others ("Plan Omega").

In March, 1976, WMC sought approval of Plan Omega pursuant to Section 1122. (6a).[1] As required, WMC's application for approval was submitted to the Delaware Bureau of Comprehensive Health Planning (the "DPA") and to local planning agencies, each of which certified the Plan as necessary. (6a). The approval of the DPA was forwarded to the Secretary, who then issued the Section 1122 approval of Plan Omega in August, 1976. (7a). This approval guaranteed that the Secretary would not withhold the capital reimbursement portion of WMC's charges to patients under federal programs on the ground that Plan Omega was an unnecessary capital expenditure. (7a).

Thereafter, in September, 1976, an action was filed in the United States District Court for the District of Delaware by certain plaintiffs, including Wilmington United Neighborhoods, one of the plaintiffs herein, challenging Plan Omega as violating Title VI of the Civil Rights Act of 1964 (42 U. S. C. § 2000d) ("Title VI"), Section 504 of the Rehabilitation Act of 1973 (29 U. S. C. § 794) ("Section 504"), and the Environmental Impact Statement requirements of the National Environmental Policy Act of 1969 (42 U. S. C. § 4332(a)). (4a, 40a, 48a). In *NAACP v. Wilmington Medical Center, Inc.*, 436 F. Supp. 1194 (D. Del. 1977) *aff'd* 584 F. 2d 619 (3d Cir. 1978), the plaintiff's claim under the National Environmental Policy Act of 1969 was rejected; the court holding that the duties of the Secretary with respect to approving Plan Omega under Section 1122 were not major federal

1. References to the Appendix to the Petition for Certiorari filed by plaintiffs will be designated in parenthesis with a page number followed by the letter "a", e.g., "(2a)."

action and thus did not require the preparation of an environmental impact statement.

In *NAACP v. Wilmington Medical Center, Inc.*, 453 F. Supp. 280 (D. Del. 1977), the Delaware District Court, on cross-motions for summary judgment, rejected plaintiff's challenge to Plan Omega under Title VI and Section 504. In particular, the District Court found that HEW did not act arbitrarily and capriciously in finding, after a massive administrative investigation, that Plan Omega, as modified to include certain civil rights assurances, was in compliance with Title VI and Section 504. The District Court also found that plaintiffs had no private right of action under Title VI and Section 504.

In *NAACP v. Wilmington Medical Center, Inc.*, 599 F. 2d 1247 (3d Cir. 1979), the Court of Appeals for the Third Circuit reversed the District Court's holding that plaintiffs had no right to a private right of action under Title VI and Section 504. The matter was remanded to the District Court for a trial *de novo* of plaintiff's Title VI and Section 504 claims against WMC. On May 13, 1980, the Delaware District Court handed down its post-trial decision, finding against plaintiffs and in favor of WMC on all claims asserted. *NAACP v. Wilmington Medical Center, Inc.*, — F. Supp. — (D. Del. 1980) (slip opinion, No. 76-298, May 13, 1980).

Meanwhile, after waiting nearly the full six months permitted by statute, on February 4, 1977, plaintiffs herein filed a request for reconsideration of the Secretary's August 6, 1976 Section 1122 approval of Plan Omega. (7a-8a). As plaintiffs concede, this request included a request that the Secretary consider allegations that the DPA had violated or ignored the standards set forth in applicable regulations and the state health plan. (Pet. 6).[2] The response

2. References to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit herein will be designated as "Pet. —".)

to plaintiff's request for reconsideration, and the supplements thereto, was issued by HEW on September 7, 1977, over the signature of Dr. Harold Margulies, Acting Administrator of the Health Resources Administration of the Department of Health, Education and Welfare. (50a). The response indicated, *inter alia*, that (1) the DPA's review in this case was consistent with the requirements of Section 1122; (2) the Secretary is not authorized to make an independent finding as to the consistency of the proposed capital expenditure with applicable standards, criteria and plans; and (3) if the Wilmington Medical Center makes a capital expenditure which is different from that approved by the DPA, it may be subject to the withholding of reimbursement. (J. A. 83-90).[3]

Believing that the last mentioned finding was in need of clarification, the Acting Administrator issued a letter on October 12, 1977, in which paragraph 5 of his September 7, 1977, letter was revised. (J. A. 91-94). The revised paragraph made it clear that WMC risked losing reimbursement under Section 1122 for any changes in Plan Omega, which changes themselves constituted "capital expenditures" as that term is defined in the Section 1122 regulations. This revision concerning the possible effect of compliance by WMC with the conditions necessary to bring Plan Omega into compliance with Title VI and Section 504 made it clear that on reconsideration HEW had made its findings consistent with the Section 1122 regulations and in particular with 42 C. F. R. § 100.103(a)(2)(v).

On September 30, 1977, the Secretary apparently received a letter in support of Plan Omega from Irving Shapiro, the chairman of the board of the Dupont Company. This letter was three sentences in length. (13a).

3. References to the Joint Appendix filed in the Court of Appeals are designated herein as ("J. A. —").

According to plaintiffs, the letter had placed upon it a "Priority" stamp and directions that it be routed to certain officials in the Office of Civil Rights of HEW and in HEW's Philadelphia regional office. (Pet. 10). Notably, there is no contention by plaintiffs that the letter was routed to Dr. Margulies, the author of the October 12, 1977, clarification letter about which plaintiffs complain.

In contrast to the single letter from a proponent of Plan Omega, opponents of the Plan, including plaintiffs, took much more direct action. For instance, on December 5, 1977, 90 persons under the aegis of Wilmington United Neighborhoods conducted an hour long demonstration at the office of the Secretary, attended a meeting with the Undersecretary of HEW and attended a meeting with the staff of the Congressional Black Caucus (Docket No. 27, Appendix G at ¶ 4).[4] The purpose of this demonstration and these meetings was admittedly to influence the Secretary's Section 1122 determination with respect to Plan Omega. (*Id.* at ¶ 5). Interestingly, plaintiffs' attorneys, the same attorneys who now complain of administrative decisions "reached as a result of improper influences which corrupted the decision-making process" (Pet. 15-16), arranged the meeting with the Congressional Black Caucus, a meeting with the avowed purpose of having the Black Caucus write a protest to the Secretary and arrange for a Congressional oversight hearing. (*Id.* at ¶ 7). Of course, other plaintiffs elected to avail themselves of the same approach utilized by Mr. Shapiro and wrote letters protesting the Section 1122 approval of Plan Omega to both HEW and the DPA. (Docket No. 27 and exhibits thereto).

On November 11, 1977, plaintiffs commenced this action, alleging causes of action against HEW, the DPA

4. References to the record in the United States District Court for the District of Delaware herein are designated ("Docket No. —").

and two subordinate state and local planning agencies. In December, 1977, plaintiffs amended their Complaint as a matter of right, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, to add WMC as a party defendant and to assert claims against WMC.

In January, 1978, WMC, HEW and the DPA each moved to dismiss the Complaint. (J. A. 50A, 51, 36). Plaintiffs filed cross motions for summary judgment. (J. A. 99, 249). All parties, including plaintiffs, engaged in discovery. (Docket Nos. 11, 22, 24, 25, 26, 27, 35, 36, 38, 53, 63). After the various motions had been fully briefed and argued, the District Court on September 22, 1978, granted summary judgment in favor of all defendants and against plaintiff on all claims asserted against defendant in this action. (107a-113a).

On appeal, the Court of Appeals for the Third Circuit affirmed the decision of the District Court on all issues. (1a-33a). Judge Adams dissented on the issue of whether federal jurisdiction to adjudicate claims against the DPA was precluded by Section 1122(f). (22a, 33a).

In their petition, plaintiffs raise two questions: (1) whether an allegation of improper influence is sufficient to overcome a clear statutory preclusion of judicial review and (2) whether there can be judicial review of the decision of the DPA in the light of Section 1122(f), its purpose and its legislative history.

As is evident from their respective decisions, both the District Court and the Court of Appeals properly considered the applicable case law, including the relevant decisions of this Court, and found that judicial review of plaintiffs' claims in this case was barred. These decisions are consonant with the standards set down by this Court and the decision of the Court of Appeals is not in conflict with decisions by other courts of appeals on the relevant issues.

ARGUMENT.

The Decision Below Is Clearly Correct and in Harmony With Relevant Decisions of This Court.

The decision below was reached after careful consideration of relevant decisions of this Court and the holding that Section 1122(f) precludes judicial review of plaintiffs' claims is clearly correct. Plaintiffs' argument to the contrary is specious.

Plaintiffs initially attack the Secretary's decision on reconsideration as having been "a result of improper influences which corrupted the decision-making process" and, therefore, as not having been made under the statute. (Pet. 15-16). By so directing their attack, they seek to avoid the clear preclusion of judicial review contained in Section 1122(f). This is similar to the approach attempted and found wanting in *Briscoe v. Bell*, 432 U. S. 404 (1977), which has not been cited in the Petition.

In *Briscoe*, as in this case, the statute in question "could hardly prohibit review in more explicit terms." *Briscoe v. Bell, supra* at 409. In *Briscoe*, the District Court had ruled that the preclusion of judicial review in Section 4(b) of the Voting Rights Act of 1965 (42 U. S. C. § 1973b) did not extend to the "pure legal question" of whether officials had correctly interpreted the Act. The Court of Appeals also considered the preclusion question and found that, even where Congress intended to preclude judicial review, "limited jurisdiction exists to review actions which on their face are plainly in excess of statutory authority." *Briscoe v. Levi*, 535 F. 2d 1259, 1265 (D. C. Circuit 1976), quoted in *Briscoe v. Bell, supra* at 408. The Supreme Court rejected both of these approaches to evading the clear command of the preclusion statute. The

attempt of plaintiffs herein to give them new life is both factually and legally without merit.

Plaintiffs contend that HEW "reversed" its earlier decision that WMC's compliance with civil rights assurances would require it to undergo an entirely new Section 1122 review of Plan Omega (Pet. 10) on the basis of influence by "a powerful economic and political figure." (Pet. 22). Thus, they contend that the HEW decision was not made under the statute. This claim is wholly without basis. In the language of the District Court (69a-70a), as quoted by the Court of Appeals:

> "As the October 12 letter to plaintiffs' counsel illustrates, however, the Secretary based his decision on his interpretation of the statute and the regulations implementing it. The fact that HEW apparently had reached a contrary conclusion only a month earlier, or that the interpretation may be erroneous as a matter of law, or that the Secretary's decision may have been influenced by a letter from a business leader and personal friend of the President is irrelevant, because in any of those events section 1122(f) would still preclude judicial review. See *Briscoe v. Bell, supra,* 432 U. S. at 409-15." (14a).

Plaintiffs attempt to save their claim by reliance on *Johnson v. Robinson,* 415 U. S. 361 (1974) and *Weinberger v. Salfi,* 422 U. S. 749 (1975). This reliance is misplaced. In *Johnson v. Robinson, supra,* the court concluded that the particular language of the statute in question did not give any basis for a conclusion that Congress intended to preclude a challenge to the constitutionality of veterans' benefits legislation. Again, in *Weinberger v. Salfi, supra,* the court concluded that Section 405(h) of the Social Security Act (42 U. S. C. § 405(h)) did not

preclude judicial review of constitutional challenges. Rather, it merely required that such challenges be brought under the jurisdictional grants contained in the Act. As was correctly noted by the District Court in this case:

> "None of the defendants have argued that section 1122(f), which bars judicial review of a 'determination by the Secretary under [section 1122]' precludes review of plaintiffs' constitutional claims. Moreover, the Supreme Court has construed similar statutory language as not precluding judicial review of decisions relating to the constitutionality of the underlying statute. *Johnson v. Robinson,* 415 U. S. 361, 366-74 (1974); see *Califano v. Sanders,* 430 U. S. 99, 199 (1977)." (58a at n. 44).

Thus, plaintiffs' constitutional claims in this case were considered and found wanting by both the District Court (98a-106a) and the Court of Appeals (19a-21a). These decisions are fully in keeping with the principles set forth in *Johnson v. Robinson, supra,* and *Weinberger v. Salfi, supra. See Califano v. Sanders,* 430 U. S. 99 (1977).

Plaintiffs do not attempt to raise any constitutional claim herein and their specious claim of undue influence gives no ground for avoiding the clear command of Section 1122(f). Here, as in *Briscoe v. Bell, supra,* the language of the statute is absolute on its face and admits of no exceptions. *See Union Pacific Railway Company v. Sheehan,* 439 U. S. 89 (1978). The decision below that the Secretary's determination on reconsideration is "manifestly unreviewable by the terms of Section 1122(f)" is clearly correct and in harmony with the decisions of this Court.

So, too, is the decision that Section 1122(f) precludes review of the decisions made by the DPA, Plaintiffs' contention to the contrary is without merit.

The applicable law on this question is not in dispute. It is settled that Congress may exercise its power to limit federal jurisdiction in such a way as to preclude judicial review. Furthermore, while evidence of Congressional intent to create such a limitation must be clear and convincing, a clear command of the statute will preclude review. *Abbott Laboratories v. Gardner,* 387 U. S. 136 (1967); *Barlow v. Collins,* 397 U. S. 159 (1970); *Dunlop v. Bachowski,* 421 U. S. 560 (1975).

In the instant case, both of the courts below applied the applicable law and correctly found that the legislative history and statutory purpose of Section 1122 clearly indicated that Congress intended that there be no federal judicial review of decisions by the DPA. Thus, it was found that Section 1122 was intended by Congress to contain hospital costs by denying reimbursement for health care related capital expenditures not deemed necessary by the states and to encourage rational health planning by the states. (15a, 75a). *See NAACP v. Wilmington Medical Center, Inc.,* 584 F. 2d 619, 627-28 (3d Cir. 1978). It was further determined that the legislative history of the statute indicated that Section 1122 was not meant to change in any way "the autonomy or authority of existing State or local planning agencies." H. R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Admin. News 4989, 5066. (16a, 76a).

When the deference to state health planning efforts and HEW's limited role under Section 1122 are viewed in connection with the fact that Section 1122(f) precludes review of the Secretary's decision, it is clear that Congress intended that federal interference, including review by the federal judiciary, with the planning decisions of the states was to be avoided. In language adopted by the Court of Appeals (16a), the District Court correctly reasoned:

> "Given the prohibition on judicial review of the Secretary's decision set forth in Section 1122(f), it is inconceivable that Congress could have intended the Federal judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of the proposed capital expenditure." (77a).

The courts below correctly found that there was persuasive reason to believe that Congress intended to cut off judicial review of decisions by the DPA under Section 1122. *See Morris v. Gresette,* 432 U. S. 491 (1977). Like most, if not all, preclusion statutes, Section 1122(f) was born out of a legislative desire to streamline the applicable agency process so that costly delays could be avoided.[5] (17a). The time constraints on a health care provider such as WMC make it necessary, as Congress and the Secretary have recognized, to be able to plan its capital expenditures with a reasonable assurance that, once approval by the applicable agencies has been obtained, such planned expenditures may be undertaken with the assurance that capital expenditures will be reimbursed. The threat to this interest created by the possibility of interminable litigation is intolerable. No case could demonstrate more cogently the effect of lengthy litigation upon the orderly planning and administration of capital improvements than the case at bar. WMC has already encountered increased costs which reach into the millions of dollars because of delay created by this litigation. Given

5. The statute and regulations clearly indicate the desire to streamline the 1122 process. Under Section 1122(d)-(1)(B)(i), the Secretary shall disallow reimbursement if the DPA has rejected the proposal for a capital expenditure "within a reasonable period." Pursuant to the applicable regulations, 42 C. F. R. § 100.106(a)(4), the "reasonable period" shall not exceed 90 days. The failure of the DPA to notify the proponent of the capital expenditure of its decision prior to the expiration of 90 days from receipt of the application has the effect of a favorable determination. *Id.*

the clear intent of Congress to provide a process whereby a health care provider might receive early approval of its planned capital expenditure, it is simply illogical to suggest that, where review of the Secretary's determination is not available, every preliminary determination down the line might be subject to such review.

Plaintiffs also contend that Section 1122 is a "federal" program and, therefore, intervention by the federal judiciary is necessary if there is to be uniformity in the interpretation of federal regulations across the country. (Pet. 17-18). In language ignored by plaintiffs, the Court of Appeals correctly rejected this contention, stating:

> "We find these arguments unpersuasive. Statutes precluding judicial review would be rendered meaningless if the federal courts could always intervene in so-called 'federal' programs." (16a).

The Court of Appeals then went on to reject the premise that the Section 1122 program is a "federal" program. Plaintiffs' argument to the contrary is based on the wholly unsupported notion that Section 1122 was meant to be uniformly applied. (Pet. 27). This argument ignores the legislative history of Section 1122, which clearly indicates a Congressional intent to "in no way change the autonomy or authority of existing state or local planning agencies." H. R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Admin. News 4989, 5066. As noted by the Court of Appeals, the autonomy and authority of state and local planning agencies would most surely be changed if the determination of the DPA were reviewable in federal court. (16a).

It is clear that the court below applied the appropriate case law to reach the conclusion that Section 1122(f) pre-

cludes review of determinations of the DPA. The decisions below are fully in harmony with the relevant decisions of this Court and there exist no special or important reasons for granting a writ of certiorari in this case.

Plaintiffs' attempt to argue that the decision of the court below is in conflict with a decision of the Court of Appeals for the Seventh Circuit is totally without merit. *Lakeside Mercy Hospital v. Indiana State Board of Health,* 421 F. Supp. 193 (N. D. Ind.), *aff'd without opinion* 547 F. 2d 1170 (7th Cir. 1976), is a District Court decision which was affirmed without opinion by the Court of Appeals for the Seventh Circuit. The issue of the preclusive effect of Section 1122(f) was not raised by any party in that litigation and the District Court did not consider the issue. In affirming without opinion, the Court of Appeals certainly did not consider the issue and the decision in that case does not conflict with the decision of the court below in this case.

Finally, although the Court of Appeals herein did not find it necessary to discuss the issue, the District Court held that review of plaintiffs' claims against the DPA was barred for yet another reason. Plaintiffs submitted each of their claims against the DPA in their February 4, 1977 request for reconsideration, and supplements thereto.[6] These claims were considered and rejected by the Secretary. As a result, review of these claims is expressly precluded by Section 1122(f). (78a, 79a, 87a-88a).

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6. The District Court found that plaintiffs lacked standing to assert their claim that the DPA breached the Section 1122 agreement between the State of Delaware and HEW by failing to submit copies of comments, reports and findings of the subordinate health planning agencies to HEW at the time the DPA recommended approval of Plan Omega (80a-81a). Plaintiffs did not appeal this holding. (Plaintiffs' Brief below at 6).

CONCLUSION.

The decision below is consistent with this Court's interpretation of federal law and does not conflict with decisions of other courts of appeals. For the reasons set forth herein, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,
Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners reply to new points raised by the Federal Respondent in its opposition as follows:

The Federal Respondent claims that Petitioners did not raise below the contention that the Secretary's decision was not made "under the statute", therefore "it is not properly raised here" (Brief

for Federal Respondent, p. 7). That contention is incorrect. In their brief to the Court of Appeals for the Third Circuit, relevant excerpts reproduced in an appendix herewith (see pp. i-vi), petitioners clearly claimed that a decision reached as a result of the personnel and political influence of a powerful friend and advisor to the President was not a determination made under the statute (section 1122(f)) and therefore not within the preclusion of judicial review of that statute.

Respectfully submitted,

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APPENDIX

RELEVANT EXCERPTS FROM BRIEF OF PETITIONER IN THE U.S. COURT OF APPEALS

...

[20]

V. ARGUMENT

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT IT WAS PRECLUDED FROM CONSIDERING THE STATUTORY AND REGULATORY CAUSES OF ACTION.

...

[22]

...

1. The Statutory and Regulatory Causes of Action Are Not Precluded by The Clear Command of The Statute.

In determining whether a particular claim is precluded by the language of the statute, federal courts, favoring reviewability, have given no broader interpretation to the literal language of a preclusion statute than it literally demands. Thus, in Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967), involving a statute utilizing preclusion language at least as broad as that

in §1122(f)13/, that Court held that a preclusion of judicial review of "a claim for benefits" did not preclude review of any subsequent discontinuance of benefits already

[23]

conferred. Later, the Supreme Court, in reviewing that statute, as amended by Congress to reverse Tracy v. Gleason, held that the successor preclusion provision did not reach constitutional challenges, as, albeit broader, it still did not reach constitutional challenges. Johnson v. Robinson, 415 U.S. 360 (1974). The Supreme Court said (at 367),

> "A decision of Law or fact "under" a state is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. Appellee's constitutional challenge is not to any such decision of the Administrator, but rather to a decision of Congress ..."

13/ 38 U.S.C. §211(a) (1958) provided: " ... the decisions of the Administrator on any question of law or fact concerning a claim for benefits of payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

The following year the Supreme Court, in Weinberger v. Salfi, 422 U.S. 749 (1975), drew a contrast between statutes precluding judicial review entirely, and those precluding review of an administrator's decisions under the statute. Citing its decision in Johnson v. Robinson, the Supreme Court said

> "We concluded that [38 U.S.C. §211(a) did not preclude] an attack on the constitutionality of a statutory limitation. We concluded that it did not, basically because such a limitation was not a "decision" of the Administrator "on any question of law or fact"; indeed, the "decision" had been made by Congress, not the Administrator, and the issue was one which the Administrator considered to be beyond his jurisdiction ..."
>
> "The language of §405(h) is quite different. Its reach is not limited to decisions of the Secretary on issues of law or fact. Rather, it extends to any "action" seeking to recover on any [Social Security] claim - irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory restrictions ..."

The distinction demonstrates the error of the District Court's decision in the instant case with respect to those causes

[24]

of action described above. Congress has not precluded all instances of judicial review under the §1122 program by the limitation set forth in §1122(f). Only actions, first, by the Secretary, and second, which constitute determinations by the Secretary under this section, are precluded from judicial review.

...

[25]

...

The second claim against HEW is also beyond the scope of the limitation of §1122(f). Allegations that government officials acted, not in an impartial administration of their duties, but as a result of the special influence of a powerful economic figure, a personal friend and advisor to the President, goes to the very heart of governmental legitimacy. Less than a month before the intervention of Shapiro, the Acting Administrator of HRA had taken the position that the changes necessitated by civil rights obligations

required an entirely new §1122 review (J.A. 90). Indeed, the Office for Civil Rights also indicated that the changes which it was then negotiating would require local and state health planning agency approval (J.A. 79). These changes involved unlimited commitments of funds and changes in services, including: an obligation to provide transportation (and obtain sufficient buses) to meet the unlimited demands of patients, their visitors, and employees; the obligation to renovate the Delaware Division, no matter what the cost; an open-

[26]

ended obligation to rearrange services to correct an over-occupancy problem at the Delaware Division and still not violate the racial identifiability standards which HEW and WMC established; architectural changes in both the planned facility and the Delaware Division to comport with §504. The District Court itself has noted that these commitments represent substantial, and unlimited, financial commitments (supra, pp. 15-16). They obviously involve additional capital expenditures and a change of service as those terms are used in the §1122 regulation (see 42 CFR

§100.103(a)(2)(v)). However, within days after Shapiro asked Califano to reconsider the September 7 decision that these changes required a new §1122 review, the September 7 decision was summarily reversed. Further, the final civil rights contract, without explanation, did not include the previously described necessary submittal to state and local health planning agencies (supra, p. 12). The preclusion of review provision in §1122(f) does not, on its face, reach the issues raised by this cause.

...